DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-681
Title: Pamela Harris, et al., Petitioners
v.
Pat Quinn, Governor of Illinois, et al.
Docketed: December 5, 2011
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (10-3835)
Decision Date: September 1, 2011

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 29 2011	Petition for a writ of certiorari filed. (Response due January 4, 2012)
Dec 22 2011	Order extending time to file response to petition to and including February 3, 2012, for all respondents.
Dec 30 2011	Waiver of right of respondent Pat Quinn, Governor of Illinois to respond filed.
Jan 4 2012	Motion for leave to file amici brief filed by Center for Constitutional Jurisprudence, et al..
Jan 4 2012	Brief amici curiae of Cato Institute, et al. filed.
Feb 3 2012	Brief of respondent SEIU Healthcare Illinois and Indiana, et al. in opposition filed.
Feb 15 2012	DISTRIBUTED for Conference of March 2, 2012.
Feb 16 2012	Reply of petitioners Pamela Harris, et al. filed. (Distributed)
Feb 29 2012	Response Requested . (Due March 30, 2012)
Mar 19 2012	Order extending time to file response to petition to and including April 30, 2012.
Apr 30 2012	Brief of respondent Pat Quinn, Governor of Illinois in opposition filed.
May 10 2012	Reply of petitioners Pamela Harris, et al. filed.
May 15 2012	DISTRIBUTED for Conference of May 31, 2012.
Jun 25 2012	DISTRIBUTED for Conference of June 28, 2012.
Jun 29 2012	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 10 2013	Brief amicus curiae of the United States filed.
May 21 2013	DISTRIBUTED for Conference of June 6, 2013.
May 22 2013	Supplemental brief of petitioners in response to brief amicus curiae of the United States filed. (Distributed).
Jun 10 2013	DISTRIBUTED for Conference of June 13, 2013.
Jun 17 2013	DISTRIBUTED for Conference of June 20, 2013.

Jun 25 2013	DISTRIBUTED for Conference of June 26, 2013.
Sep 23 2013	DISTRIBUTED for Conference of September 30, 2013.
Oct 1 2013	Motion for leave to file amici brief filed by Center for Constitutional Jurisprudence, et al. GRANTED.
Oct 1 2013	Petition GRANTED.
Oct 22 2013	The time to file the joint appendix and petitioners' brief on the merits is extended to and including November 22, 2013.
Oct 30 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent Quinn.
Oct 31 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Nov 1 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents S.E.I.U. Healthcare Illinois & Indiana, et al.
Nov 4 2013	SET FOR ARGUMENT ON Tuesday, January 21, 2014.
Nov 13 2013	Record received from U.S.C.A. for 7th Circuit is electronic (Not on PACER).
Nov 22 2013	Joint appendix filed. (Statement of costs filed.)
Nov 22 2013	Brief of petitioners Pamela Harris, et al. filed.
Nov 27 2013	Brief amici curiae of California Public School Teachers, et al. filed.
Nov 27 2013	Brief amici curiae of Cato Institute, et al. filed.
Nov 27 2013	Brief amici curiae of Center for Constitutional Jurisprudence, et al. filed.
Nov 27 2013	Brief amici curiae of Family Child Care Inc., et al. filed.
Nov 27 2013	Brief amicus curiae of Illinois Policy Institute filed. (Distributed)
Nov 27 2013	Consent to the filing of amicus cuirae briefs, in support of either party or of neither party, received from counsel for respondent AFSME Council 31.
Nov 29 2013	Brief amici curiae of Albert Contreras, et al. filed.
Nov 29 2013	Brief amicus curiae of Mackinac Center for Public Policy filed. (Distributed)
Dec 2 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Local 73, S.E.I.U.
Dec 4 2013	CIRCULATED.
Dec 23 2013	Brief of respondent SEIU Healthcare Illinois & Indiana filed. (Distributed)
Dec 23 2013	Brief of respondents AFSCME Council 31, and SEIU Local 73 filed. (Distributed)
Dec 23 2013	Brief of respondent Pat Quinn, Governor of Illinois filed. (Distributed)
Dec 27 2013	Brief amici curiae of American Association of People With Disabilities, et al. filed. (Distributed)
Dec 30 2013	Brief amicus curiae of the United States filed. (Distributed)
Dec 30 2013	Brief amici curiae of 21 Past Presidents of the D.C. Bar filed. (Distributed)
Dec 30 2013	Brief amici curiae of State of New York, et al. filed. (Distributed)
Dec 30 2013	Brief amici curiae of Public Safety Employees filed. (Distributed)
Dec 30 2013	Brief amici curiae of Labor Law Professors filed. (Distributed)
Dec 30 2013	Brief amicus curiae of The Paraprofessional Healthcare Institute (PHI) filed. (Distributed)
Dec 30 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Dec 30 2013	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Dec 30 2013	Brief amici curiae of National Education Association, et al. filed. (Distributed)
Dec 30 2013	Brief amici curiae of California, et al. filed. (Distributed)
Dec 30 2013	Brief amici curiae of Homecare Historians filed. (Distributed)
Jan 10 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 14 2014	Reply of petitioners Pamela Harris, et al. filed. (Distributed)
Jan 21 2014	Argued. For petitioners: William L. Messenger, Springfield, Va. For respondents: Paul M. Smith, Washington, D. C.; and Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

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No. 11-____

IN THE

Supreme Court of the United States

PAMELA HARRIS et al.,
Petitioners,

v.

PAT QUINN, in His Official Capacity as Governor of the State of Illinois et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a State, consistent with the First and Fourteenth Amendments to the United States Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the State for greater reimbursements from its Medicaid programs?

2. Did the lower court err in holding that the claims of providers in the Home Based Support Services Program are not ripe for judicial review?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the United States Court of Appeals for the Seventh Circuit were Plaintiffs-Appellants Pamela Harris, Ellen Bronfeld, Carole Gulo, Michelle Harris, Wendy Partridge, Theresa Riffey, Stephanie Yencer-Price, Susan Watts, and Patricia Withers and Defendants-Appellees Pat Quinn, in his official capacity as governor of the State of Illinois, SEIU Healthcare Illinois & Indiana, SEIU Local 73, and AFSCME Council 31.

CORPORATE DISCLOSURE STATEMENT

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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Supreme Court Rule 29.6 ii

IN THE

Supreme Court of the United States

No. 11-___

PAMELA HARRIS et al.,
Petitioners,

v.

PAT QUINN, in His Official Capacity as Governor of the State of Illinois et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Pamela Harris, Carole Gulo, Michelle Harris, Wendy Partridge, Theresa Riffey, Stephanie Yencer-Price, Susan Watts, and Patricia Withers respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on 1 September 2011. (App. 1a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit dated 1 September 2011 is reported at 656 F.3d 692 (7th Cir. 2011). (App. 1a). The opinion of the United States District Court for the Northern District of Illinois is reported at 189

L.R.R.M. (BNA) 2900, 2010 WL 4736500 (12 Nov. 2010). (App. 18a).

JURISDICTION

On 1 September 2011, the Seventh Circuit entered a judgment that affirmed a district court judgment dismissing the Complaint of the Petitioners-Appellants. (App. 1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I.

The state provisions involved are Illinois Public Act 93-204, 2003 Ill. Legis. Serv. 93-204 (App. 40a); Illinois Executive Order 2003-08 (4 Mar. 2003) (App. 45a); and Illinois Executive Order 2009-15 (29 June 2009) (App. 48a).

STATEMENT OF THE CASE

The State of Illinois requires that individuals who provide in-home care to Medicaid recipients accept and support an exclusive representative to petition the State over its reimbursement rates for that care. Petitioners assert that compelling them to associate for purposes of petitioning government about a public-aid program infringes on their right to free expressive association guaranteed by the First Amendment.

I. Illinois' Home-Based Medicaid Programs

The federal Medicaid Home and Community Based Service Program partially funds state programs that assist persons with disabilities with living in their homes to prevent their institutionalization. *See* 42 U.S.C. § 1396n(c).[1] Illinois operates two such programs through its Department of Human Services ("DHS"): (1) the Home Services Program ("Rehabilitation Program"), 20 Ill. Comp. Stat. 2405 et seq.; and (2) the Home Based Support Services Program ("Disabilities Program"), 405 Ill. Comp. Stat. 80/2-1 et seq. Among other things, these programs subsidize a program participant's costs of employing a "provider" or "personal assistant" to provide in-home personal care.

Under the Rehabilitation Program, a "Personal Assistant (PA)" is "an individual employed by the customer to provide . . . varied services that have been approved by the customer's physician." 89 Ill. Admin. Code § 676.30(p). The program participant or "customer" is "the employer of the PA," and is "responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." *Id.* at § 676.30(b); *see also id.* at § 684.20(b) (similar).

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[1] General information about these types of programs can be found at Janet O'Keefe et al *Understanding Medicaid Home & Community Services: A Primer*, (U.S. Dep't of Health & Human Serv., 2010 ed., 29 Oct. 2010) (available at http://aspe.hhs.gov/daltcp/reports/2010/primer10.pdf) (accessed on 21 Nov. 2010).

The Rehabilitation Program will pay for those personal assistant services deemed necessary in a physician-approved service plan. *Id.* at §§ 684.10, 684.50, 686.40. However, "[a]lthough DHS shall be responsible for ensuring that the funds available under the [Rehabilitation Program] are administered in accordance with all applicable laws, DHS shall not have control or input in the employment relationship between the customer and the personal assistants." *Id.* at § 676.10(c).

The Disabilities Program operates in a similar fashion. Persons with disabilities or their guardians may employ providers to provide in-home personal care, and are responsible for their hiring, firing, and supervision. DHS pays for these in-home services to the extent permitted by a service plan. *See* 405 Ill. Comp. Stat. 80/2-6; 59 Ill. Admin. Code §§ 117 et seq.

Petitioners (the "Providers") are providers who serve participants in either the Rehabilitation or Disabilities programs. All but one Provider cares for a disabled family member. Several provide this care within their own homes.

II. The State Compels Personal Assistants to Support a Representative to Petition the State over Its Rehabilitation Program

In 1985, the Illinois State Labor Relations Board held that personal assistants are not public employees of the State under Illinois' Public Labor Relations Act. *See State of Ill. (Dep't of Cent. Mgmt. Serv. & Rehab. Serv.)*, 2 PERI P 2007 (1985), *superseded by* 2003 Ill. Legis. Serv. 93-204. The Board found that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois

pays individuals (the service providers) to work under the direction and control of private third parties (service recipients)." 2 PERI P 2007, at *2.

On 4 March 2003, former Illinois Governor Blagojevich issued Executive Order ("EO") 2003-08, which called for state recognition of an exclusive representative for personal assistants. (App. 45a). Blagojevich's order asserted that it is "essential for the State to receive feedback from personal assistants in order to effectively and efficiently deliver home services," and that personal assistants "cannot effectively voice their concerns about the organization of the Home Services Program, their role in the program, or the terms and conditions of their employment under the Program without representation." (App. 46a).

On 16 July 2003, Governor Blagojevich codified EO 2003-08 by signing Illinois Public Act 93-204, 2003 Ill. Legis. Serv. 93-204. (App. 40a). The Act recognized "the right of the persons receiving services defined in this Section to hire and fire . . . personal assistants or supervise them within the limitations set by the Home Services Program." 20 Ill. Comp. Stat. 2405/3(f). (App. 44a). Nevertheless, it designated personal assistants to be "public employees" of the State *"[s]olely* for the purposes of coverage under the Illinois Public Labor Relations Act," and for no other purpose, "including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." *Id.* (emphasis added) (App. 43a-44a); *see also* 5 Ill. Comp. Stat. 315/3(n) (similar) (App. 41a-42a).

About 26 July 2003, the State designated SEIU Healthcare Illinois-Indiana ("SEIU") to be the personal assistants' exclusive representative for purpose

of bargaining with the State over its Rehabilitation Program. The State and SEIU then entered into agreements that require, among other things, that all personal assistants pay compulsory fees to the SEIU. These fees are directly deducted from the Medicaid monies paid to the assistants for caring for program participants. As a result, each year more than 20,000 personal assistants in Illinois are forced to pay over $3.6 million to the SEIU to petition the State.

In June 2009, current Illinois Governor Pat Quinn issued EO 2009-15, which is almost identical to EO 2003-08, but targets providers in the Disabilities Program. (App. 48a). It calls for the designation of an exclusive representative for these providers pursuant to either an election or card-check, and is similarly predicated on the proposition that providers "cannot effectively voice their concerns . . . without representation." (App. 49a-50a).

Despite Governor Quinn's support for mandatory representation, Disabilities Program providers defeated efforts by SEIU Local 73 and AFSCME Council 31 to become their representative in a mail-ballot election that concluded on 19 October 2009. However, EO 2009-15 remains in effect. These providers thus remain under threat of the State designating an organization to act as their representative vis-à-vis the State.

III. Proceedings Below

On 22 April 2010, the Providers filed a class action lawsuit alleging that the First Amendment prohibits the State from compelling them to support a representative to petition the State about its Medicaid programs. On 12 November 2010, the district court dismissed their complaint. (App. 39a). On 1 Septem-

ber 2011, the Seventh Circuit affirmed the dismissal on two grounds. (App. 17a).[2]

First, the court reasoned that, if personal assistants can be considered "employees" of the State, then the case law that permits the designation of exclusive representatives for public employees controls. (App. 9a). The court found that the State can be considered the personal assistants' "joint employer," along with the Medicaid recipients who hire, fire and supervise them, because the State pays for their services and controls what services it will reimburse. (App. 10-11a). *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was thus held to control (*id.*), despite the court's acknowledgement that *Abood* was never previously applied in this context. (App. 10a).

Second, the claims of the Providers in the Disabilities Program were held to be premature because it is possible that these Providers will not be compelled to support a mandatory representative under EO 2009-15. (App. 15a-16a).

REASONS FOR GRANTING THE WRIT

This case presents the extraordinary circumstance of citizens being forced to petition a state for more benefits from a public-aid program through an advocate the state itself designated. This is grievously offensive to the First Amendment, which guarantees all individuals the freedom to choose with whom they associate to "petition the Government for a redress of grievances." U.S. Const. amend. I. Indeed, it turns the basic precepts of republican democracy on their

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[2] The district court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343, and the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

head. Instead of citizens choosing their representatives in government, government chooses representatives for its citizens. Given that similar schemes have been imposed on care providers in at least a dozen states, *see* n.10, *infra*, immediate review by this Court is warranted.

I. The Court of Appeals Has Decided an Important Federal Constitutional Question in a Way That Conflicts with This Court's First Amendment Decisions by Permitting Illinois to Force Individuals to Associate for the Sole Purpose of Petitioning Government

The First Amendment guarantees individuals the right to associate for the expressive purposes of "speech" and "'petition[ing] the Government for a redress of grievances." U.S. Const. amend. I. Of course, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984). State compelled association for expressive purposes is thus subject to strict constitutional scrutiny. *Id.* at 623; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

This Court has reviewed the constitutionality of compelled expressive association in several contexts. These include government compelling public employees to associate with political parties, *Elrod v. Burns*, 427 U.S. 347 (1976); public employees to associate with unions, *Abood*, 431 U.S. 209; private groups to associate with individuals, *Roberts*, 468 U.S. 609, *Dale*, 530 U.S. 640; attorneys to associate with bar associations, *Keller v. State Bar of California*, 496 U.S. 1 (1990); companies to associate with marketing cooperatives, *United States v. United Foods*, 533 U.S. 405, 411 (2001); and contractors to

associate with political parties, *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

This case presents a new and pernicious form of compelled expressive association in which individuals who provide services to government-aid recipients are forced to associate with a private organization to petition the government over its subsidies for the services. Here, personal assistants are simply individuals whose services to persons with disabilities are paid for by a Medicaid program. They are like doctors, nurses, and other practitioners who care for Medicaid recipients. Illinois is forcing these personal care providers to accept and financially support a designated representative to deal with the State over its Medicaid reimbursement rates and policies.

The State thus compels association for the *very purpose* of "petition[ing] the Government for a redress of grievances" within the meaning of the First Amendment. *Cf. Borough of Duryea v. Guarnieri*, __ U.S. __, 131 S. Ct. 2488, 2495 ("[t]he right to petition is generally concerned with expression directed to the government."). It is little different from a state forcing all doctors or hospitals to lobby the state for greater Medicaid reimbursement rates through a state-appointed lobbyist.

Compelling association for the purpose of petitioning government inflicts the greatest harm to First Amendment values. The "right to petition [is] one of 'the most precious of the liberties safeguarded by the Bill of Rights,' and . . . is implied by '[t]he very idea of a government, republican in form.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (citations omitted); *see also Guarnieri*, 131 S. Ct. at 2494-95, 2498-2500; *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *De*

Jonge v. State of Or., 299 U.S. 353, 364-65 (1937). Indeed, compelling support for an advocacy group is no different from compelling support for a political party, which would be unconstitutional. *See O'Hare*, 518 U.S. at 725-26. In either case, association is compelled for the purposes of influencing government policy.

Illinois' stated justification for forcing providers to petition it through a State-designated advocate—that providers supposedly "cannot effectively voice their concerns . . . without representation," EO 2003-08 (App. 46a); EO 2009-15 (App. 49a)—is particularly abhorrent to the First Amendment. This Court has steadfastly rejected the "paternalistic premise" that expressive activities can be regulated because persons "are incapable of deciding for themselves the most effective way to exercise their First Amendment rights." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790 (1988). "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 790-91.

This Court has never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods*, 533 U.S. at 415. Illinois' policy of compelling providers to subsidize an organization for the purpose of petitioning the State for more benefits from a Medicaid program is an affront to fundamental constitutional values. It demands this Court's immediate attention.

II. The State's Interest in Maintaining "Labor Peace" in Its Workplaces Does Not Apply to Providers Who Petition the State as Citizens in Public Forums

This Court has found it "undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184 (2007). The Seventh Circuit has now extended this "extraordinary power," previously applicable only to actual government employees, *id.*, to individuals whose services are merely subsidized by a government program. This is untenable, as the state interest in "labor peace" that makes it constitutional for government employers to control how their employees petition it in the workplace has no application to care providers who petition government as citizens in public forums.

A. The "Labor Peace" Rationale Does Not Apply to Petitioning Government Outside the Workplace

"[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (citation omitted). "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also Engquist*, 553 U.S. at 598-99; *Waters v. Churchill*, 511 U.S. 661, 671-74 (1994) (plurality opinion).

Among other things, a government employer's interest in effective human-resources management grants it significant authority to control the manner in which its employees petition it within the workplace. *See Guarnieri*, 131 S. Ct. at 2495-96, 2500-01; *cf. Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) ("Employers have heightened interests in controlling speech made by an employee in his or her professional capacity."). Government also has far greater authority to regulate expressive activity on its property, such as within its workplaces, than it does in public forums. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

The government rationale that constitutionally justifies compelling public employees to deal with their employer about employment conditions through an exclusive representative—the need for so-called "labor peace"—arises from a state's unique interests in managing its employees within its workplaces. As described in *Abood*, labor peace is an interest in avoiding workplace disruptions caused by employee attempts to petition their employer through multiple organizations. 431 U.S. at 220-21. "Peace" is attained by requiring that all employees deal with their employer about workplace matters through only an exclusive representative. *Id.*[3]

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[3] *Abood* held that [t]he designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to

For example, in public schools, "the evils that the exclusivity rule . . . was designed to avoid" are the "confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* at 224. The "exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools," as it "'serves to prevent the District's schools from becoming a battlefield for inter-union squabbles.'" *Perry*, 460 U.S. at 52 (citation omitted).

Whatever its merits within a workplace, the labor peace rationale has no application outside of it. The very essence of democratic pluralism is that citizens can make competing demands on their government through multiple associations. That is a core right protected by the First Amendment:

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost. The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294-95 (1981); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-11 (1982).

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reach agreements and settlements that are not subject to attack from rival labor organizations." 431 U.S. at 220-21.

States have no legitimate interest in forcing similarly-situated citizens to petition their government through one designated representative in order to quell their disparate demands. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976).

This is true even if competing demands from diverse groups might be disruptive to government, as expressive association to influence public affairs cannot be lawfully suppressed absent extraordinary circumstances. *See De Jonge*, 299 U.S. at 364-65; (unconstitutional for state to prevent assembly to influence public affairs, absent threat of violent overthrow of government); *Claiborne Hardware*, 458 U.S. at 908-11 (unconstitutional for state to sanction nonviolent boycotts and protests). The First Amendment demands tolerance for "verbal tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate" *Cohen v. California*, 403 U.S. 15, 24-25 (1971); *see also Snyder v. Phelps*, __ U.S. __, 131 U.S. 1207, 1219 (2011) (speech in public place on matter of public concern cannot be suppressed because it is upsetting). Moreover, "'[t]he government's interest in achieving its goals as effectively and efficiently as possible is . . . a relatively subordinate interest when it acts as sovereign,'" as opposed to a "'significant one when it acts as employer.'" *Engquist*, 553 U.S. at 598-99 (quoting *Waters*, 511 U.S. at 675); *see also Riley*, 487 U.S. at 795 ("the First Amendment does not permit the State to sacrifice speech for efficiency").

In short, while government may have a legitimate interest in using exclusive representation to attain "labor peace" amongst its employees in the workplace, government has no analogous interest in using such means to impose "political peace" on citizens in public forums.

B. Illinois Has No "Labor Peace" Interest in Quelling Competing Demands from Providers Because They Petition the State Not as Employees in a Government Workplace But as Citizens in Public Forums

The labor peace justification for forced unionism amongst employees has no application to providers because, if they petition the State for changes to its Medicaid programs through multiple organizations, this will occur in *public forums* and in their capacity as *citizens*. This expressive activity cannot impair the efficiency of internal State operations. Indeed, the State complains about an ostensible *lack* of effective petitioning by providers, not unrest caused by disruptive petitioning from various associations of them. *See* EO 2003-08 (positing that personal assistants "cannot effectively voice their concerns" to the State "without representation") (App. 46a); EO 2009-15 (same) (App. 49a). Even if provider petitioning of the State were somehow disruptive, Illinois has no lawful interest in quelling their diversity of expressive association by forcing them to petition the State through one designated organization.

First, providers do not work in government workplaces like public employees, but rather in the private homes of persons with disabilities. Thus, providers cannot disrupt the harmony of a government workplace by making competing demands on the State,

as could public employees doing the same in a State workplace. *Cf. Perry*, 460 U.S. at 52 (describing labor peace interest in preventing "schools from becoming a battlefield for inter-union squabbles"). If providers petition the State for changes to its Medicaid programs, this expressive activity will occur in *public forums*. The State has no lawful interest in quelling the constitutional right of providers or anyone else to make disparate demands on the State through diverse associations in public forums.

Not only is the labor peace problem inapplicable in public forums, but so is its solution: exclusivity of representation. It may be possible for a state employer to free itself from "the possibility of facing conflicting demands from different unions" within its workplace by exclusively dealing with one union, as it can exclude rival unions from its private property. *Abood*, 431 U.S. at 221; *cf. Perry*, 460 U.S. at 52. But states cannot truly grant any organization the exclusive right to petition it in public forums, as rival groups cannot lawfully be excluded from public forums or otherwise prevented from petitioning government. The labor peace interest is not only incognizable in public forums, it is unattainable.

Second, providers act as *citizens* petitioning their State as sovereign when seeking changes to Illinois Medicaid programs, just as doctors and nurses do when seeking the same. This expressive activity is not that of a servant speaking to a master, or an employee presenting a grievance to management, because providers are not managed by the State. They are directed by the person with disabilities who employs them. Thus, if providers choose to petition the State for greater Medicaid reimbursement rates, they do so on their own time and in their capacity as

citizens. This expressive activity cannot create managerial problems for the State. Even if it could, Illinois has no more legitimate interest in using exclusive representation to quell the right of providers to petition the State through diverse associations than it would in using these means to quell the right of doctors or hospitals to lobby the State for greater Medicaid reimbursement rates through diverse associations.

Notably, these two factors often define and limit government's authority to regulate the expressive activities of its true employees. *See Guarnieri*, 131 S. Ct. at 2500-01; *Garcetti*, 547 U.S. at 417-20. Limitations on public employees' ability to petition their government employer in their capacity as employees and within the workplace have been upheld when justified by legitimate management interests.[4] In contrast, regulation of public employees' right to petition their government employer in their capacity as citizens and in public forums has been held unconstitutional. *See City of Madison*, 429 U.S. at 174-76 (unconstitutional to prohibit public employees who were represented by a union from petitioning state

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[4] *See Abood*, 431 U.S. 209 (public employees can constitutionally be required to subsidize an exclusive representative's costs of dealing with their employer on employment conditions); *Perry Educ. Ass'n*, 460 U.S. 37 (public employer can constitutionally exclude rival union from using interschool mail system); *cf. Garcetti*, 547 U.S. at 420-21 (constitutional for public employer to discipline employee for communication made pursuant to his official duties and within the workplace); *Connick v. Myers*, 461 U.S. 138, 153 (1983) (constitutional for public employer to discipline employee for creating and circulating a communication within office, on work time, that disrupted the workplace).

employer in public forum).[5] As *Abood* recognized, "the principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental decisions." 431 U.S. at 230.

Thus, even public employees cannot be compelled to support union efforts to lobby government about public programs that affect them, due in part to the inapplicability of the labor peace interest in public forums:

> Labor peace is not especially served by allowing [unions to charge employees for its lobbying expenses] because, unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are *public fora* open to all. Individual employees are free to petition their neighbors and government in opposition to the union which represents them *in the workplace*.

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 521 (1991) (emphasis added) (plurality opinion); *accord id.* at 559 (Scalia, J.) (unconstitutional to compel public employees to support union lobbying activities). Moreover, "[t]he burden upon freedom of expression is particularly great where . . . the compelled speech is in a public context." *Id.* at 522. "The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion." *Id.*

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[5] *Cf., e.g., Pickering*, 391 U.S. at 571-72 (unconstitutional to discipline public school teacher for criticizing his government employer's policies in a public forum); *Perry v. Sindermann*, 408 U.S. 593 (1972) (similar).

Here, providers that petition for changes to Illinois' Medicaid programs necessarily act as citizens in public forums—and not as employees in a government workplace—because they are neither managed by the State nor work in State workplaces. Illinois has no cognizable interest in avoiding "the possibility of facing conflicting demands," *Abood*, 431 U.S. at 221, from multiple groups of providers or any other citizens in this context. Accordingly, the labor peace interest that justifies compulsory representation for employees in the workplace has no application to personal care providers.[6]

C. The Seventh Circuit's Application of *Abood* to Providers Is Flawed and Inconsistent with This Court's Decision in *O'Hare*

The Seventh Circuit erred in concluding that the applicability of *Abood* and the labor peace interest turns on whether providers can generically be considered State "employees" in some sense. (App. 9a, 13a). This Court has refused to make constitutional rights dependent on such labels, "which [are] at best a very poor proxy for the interests at stake." *O'Hare*, 518 U.S. at 721 (citation omitted) (service provider's constitutional claim for violation of freedom of association does not turn on whether he is deemed an "employee" or "independent contractor").[7]

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[6] A simple example proves the point. If two organizations representing personal assistants lobbied the State for different changes to its Rehabilitation Program, does the State have any lawful interest in quelling this diverse expressive activity through the imposition of an exclusive representative? Basic constitutional principles dictate that the answer to this question is "no."

[7] To the extent relevant, providers are *not* State employees under the common law factors delineated in *Community for*

The lower court's error is particularly apparent from its finding it constitutionally dispositive that providers are like employees in that the State controls how much they are paid to perform certain services. (App. 13a). But that fact alone does not justify infringing on providers' First Amendment rights. Nor does it logically make the labor peace rationale applicable to providers. Government cannot compel association merely because it pays for someone's services. The same could equally be said of all government contractors or providers of services to public-aid recipients.

In *O'Hare*, this Court rejected the proposition that a service provider's constitutional claims depend on the degree to which it is dependent on government income. 518 U.S. at 722-23. "If results were to turn on these sorts of distinctions, courts would have to inquire into the extent to which the government dominates various job markets as employer or as contractor." *Id.* "We have been, and we remain, unwilling to send courts down that path." *Id.* at 723. Yet, that is the path that the Seventh Circuit traveled down here.

Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989). Illinois itself does not consider personal assistants to be its "employees" except for the sole purpose of collectivization. 20 Ill. Comp. Stat. 2405/3(f). It is not even completely accurate to describe providers as State "contractors," as they do not contract directly with the State, but rather with the persons with disabilities who hire and employ them. As the Illinois State Labor Relations Board accurately recognized in *Department of Central Management Services:* "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (service recipients)." 2 PERI P 2007, at *2.

The constitutionally relevant distinctions between providers and public employees relate to their *expressive activity*—here, the manner in which they petition government—and the State interests, if any, in controlling that expressive activity. As established above, providers differ from public employees in this controlling respect. A provider petitioning the State for changes to its Medicaid program is simply not the expressive equivalent of an employee presenting a grievance to management in the workplace. The Seventh Circuit's decision to the contrary must be reversed.

III. This Case Is of Exceptional Importance Because Compulsory Advocates Have Been, and Could Be, Imposed on Many Other Medicaid Providers and Other Recipients of Government Monies

1. The implications of the lower court's extension of compulsory representation to individuals whose services are merely paid for by government are staggering. In the field of home personal care alone, 48 states and the District of Columbia operated 314 home and community based service programs pursuant to a Medicaid-waiver, and 36 states covered personal care under their traditional Medicaid state plan.[8] Programs in at least 37 of these states are "participant directed," like Illinois' Rehabilitation and Disabilities Programs.[9]

All providers that serve the beneficiaries of these programs are now constitutionally susceptible to

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[8] *See* O'Keefe, *supra* at 29, 26.

[9] *See* O'Keefe, *supra* at 178; *see also id.* at 181 (self-directed state Medicaid programs that provide for home-based services exist in 32 states).

being forced to accept mandatory representation under the lower court's ruling. Indeed, twelve (12) states have already passed laws or issued executive orders authorizing the collectivization of persons who provide home care to Medicaid recipients, though some of these provisions have since been repealed.[10]

If government can impose mandatory advocates on personal care providers, it can constitutionally do the same to others who provide services to Medicaid or Medicare recipients. This includes not only physicians and nurses, but also entities such as hospitals and nursing homes. For example, Oregon and Washington are already forcing those who operate foster homes for persons with disabilities to support a representative to bargain with the state over Medicaid reimbursement rates for that service.[11]

No discernible principle limits compulsory representation to the healthcare industry. Any person or entity whose services are subsidized by a government program could be targeted. Contractors who perform services directly for government, such as construction or maintenance, are an obvious example. Even those who merely serve public-aid recipients are at risk.

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[10] Cal. Welf. & Inst. Code, § 12301.6(c)(1); Conn. Exec. Order 10 (21 Sept. 2011); 20 Ill. Comp. Stat. 2405/3(f); Mass. Gen. Laws ch. 118G, § 31(b); Md. Code Ann. art. 9, §§ 15-901 et seq.; Interlocal Agreement between Mich. Dep't of Cmty. Serv. & the Tri-County Aging Consortium (10 June 2004); Mo. Rev. Stat. § 208.862(3); Ohio House Bill 1, §§ 741.01-.06 (17 July 2009) (expired); Or. Const. art. XV, § 11(f); Or. Rev. Stat. § 410.612; Pa. Exec. Order 2010-04 (14 Sept. 2010) (rescinded); Wash. Rev. Code § 74.39A.270; Wis. Stat. §§ 111.81 et seq. (repealed).

[11] Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029.

This harm is not hypothetical—sixteen (16) states have already passed laws or issued executive orders that authorize compulsory representation for small businesses and individuals that provide daycare to indigent children whose care is partially subsidized by state childcare programs.[12] As with personal care providers, daycare providers are being compelled to petition states for greater subsidies for caring for public-aid recipients through state-designated advocates.

2. The Seventh Circuit attempted to downplay these ramifications, asserting that its holding is limited to personal assistants in the Rehabilitation Program. (App. 13a). This alone has broad ramifications given that similar programs exist in almost every state. The court acknowledges that, "given our holding" as to the Rehabilitation Program, the constitutional claim of providers in the Disabilities Program "will not last long" if later adjudicated. (App. 17a).

The implications of the lower court's holding are actually more expansive given its sweeping rationale that: (1) *Abood* controls if a state can be labeled a "joint employer," and (2) a state is a "joint employer"

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[12] Conn. Exec. Order 9 (21 Sept. 2011); 5 Ill. Comp. Stat. 315/3, 315/7; Iowa Exec. Order 45 (16 Jan. 2006); Kan. Exec. Order No. 07-21 (18 July 2007); Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C); Md. Code Ann. art. 5, §§ 5-595 et seq.; Interlocal Agreement Between Mich. Dep't of Human Serv. & Mott Cmty. College (27 July 2006) (repealed); Minn. Exec. Order 11-31 (15 Nov. 2011); N.M. Stat. § 50-4-33; N.J. Exec. Order 23 (2 Aug. 2006); N.Y. Exec. Order No. 12 (11 May 2007); Ohio House Bill 1, §§ 741.01-.06 (17 July 2009) (expired); Or. Rev. Stat. § 657A.430; Pa. Exec. Order 2007-06 (14 June 2007); Wash. Rev. Code § 41.56.028; Exec. Budget Act, 2009 Wis. Act 28, § 2216j (codified at Wis. Stat. §§ 111.02 et seq.) (repealed).

if it pays for the provision of defined services, even if the provider of those services is hired, fired, managed, and employed by someone else. (App. 9a-11a, 13a).

This standard could encompass other healthcare providers paid under a fee-for-service Medicaid or Medicare program. For example, patients may select their physicians under Medicare Part B. 42 U.S.C. § 1395a. But physicians and other healthcare practitioners must enroll in the program subject to numerous conditions to receive payment. *See* 42 C.F.R. §§ 424.500-424.565. The federal government controls which services it will subsidize,[13] and sets the rate of payment via a fee schedule. *See* 42 C.F.R. §§ 414.1–414.68. These are the very factors that the Seventh Circuit found dispositive in concluding that personal assistants are "jointly-employed" by Illinois. (App. 10a-11a). Under the court's expansive standard, any physicians or practitioners who care for a Medicare patient could be deemed a "joint employee" of the federal government, and thus susceptible to the imposition of a compulsory representative to deal with their ostensible federal "joint employer" over its Medicare rates.

This Court has granted review on the grounds of importance when a case addresses the constitutionality of a statute or practice that exists in multiple states. *See, e.g., Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003); *Smith v. Doe*,

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[13] Medicare Part B pays for only certain covered services, 42 C.F.R. § 424.5(a)(1), many of which must be certified as medically necessary. *Id.* § 424.24. Home healthcare and outpatient rehabilitation services must also be furnished according to an approved treatment plan, just as under Illinois' Rehabilitation Program. *Id.* §§ 424.22(a)(1)(iii); 424.27(a)(3).

538 U.S. 84, 89-90, 92 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000) *New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982). This Court's guidance regarding the constitutionality of a practice that infringes on core First Amendment rights that has already been implemented in many states, and that could be implemented in a myriad of forms throughout the nation, is required.

IV. This Case Is of Exceptional Importance Because Compelled Association to Petition Government Is Antithetical to the Principles of Democratic Pluralism Protected by the First Amendment

It is imperative that this Court not permit governments to impose compulsory advocates on those who serve government-aid recipients. The right to petition is not only a fundamental personal liberty, but is "integral to the democratic process," *Guarnieri*, 131 S Ct. at 2495. As this Court recognized in *United Foods*, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." 533 U.S. at 411.

Foremost, it distorts the democratic process for government to artificially empower special interest groups that support a particular policy agenda. Advocacy groups that individuals are conscripted to support will have resources that far exceed the true and voluntary degree of support that exists for the group and its agenda. This power is further amplified by the government designating the advocacy group as the official representative of others, and granting it special privileges in dealing with governmental bodies no others enjoy. Here, Illinois is forcing approximately 20,000 personal assistants to annually

pay over $3.6 million to support the SEIU as their exclusive representative for petitioning the State over its Medicaid policies, irrespective of whether they support that group's agenda or not. Government creation of such artificially powerful lobbying forces on one side of an issue inherently skews the "marketplace for the clash of different views and conflicting ideas" that this "Court has long viewed the First Amendment as protecting." *Citizens Against Rent Control*, 454 U.S. at 295.

This, in turn, undermines the First Amendment's purpose of ensuring that government is responsive to the will of its citizens. *See De Jonge*, 299 U.S. at 365. The "constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). The right to petition, in particular, was fashioned to "allow[ ] citizens to express their ideas, hopes, and concerns to their government and elected representatives." *Guarnieri*, 131 S. Ct. at 2495.

Government policy cannot be responsive to the true will of citizens when government dictates through whom they must speak, and to whom the government will listen. As Judge Learned Hand aptly stated, "[t]he First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" *Sullivan*, 376 U.S. at 270 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

In short, the political collectivism that lies at the heart of Illinois' scheme—in which government dic-

tates one association through which those affected by public programs must petition government—is antithetical to principles of democratic pluralism that the First Amendment protects. It must not be permitted to stand.

V. The Seventh Court's Holding That the Claims of Providers in the Disabilities Program Are Not Ripe Conflicts with Decisions of This Court and Another Circuit

The Seventh Circuit erred in concluding that the claims of Petitioners in the Disabilities Program are not ripe for review. (App. 15a). Their cause of action to enjoin enforcement of EO 2009-15 was ripe from the moment Governor Quinn signed it, as the Executive Order's sole purpose is to authorize mandatory representation for these Providers. (App. 49a-51a). Short of a bill of attainder, it is difficult to envision a regulation that more directly targets a discrete group of persons.

The lower court's speculation that the Providers may not be forced to support a representative under EO 2009-15 proves too much. (App. 15a). These Providers will not be collectivized right up until the very moment that they are. Under the court's rationale, the claims of the Providers in the Disabilities Program will not be ripe until *after* they suffer constitutional injury. That result conflicts with this Court's long established holding that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

In *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010), the Eleventh Circuit rejected the proposition that an individual (Mulhall) lacked

standing to enjoin enforcement of an agreement intended to facilitate his unionization because "it was possible that he would never be unionized." *Id.* at 1285. Contrary to the Seventh Circuit's decision here, the court there recognized that a "'probabilistic harm' is a cognizable injury for purposes of standing," and that the agreement "will substantially increase the likelihood that Mulhall will be unionized against his will." *Id.* at 1289 (citation omitted). Here, EO 2009-15 dramatically increases the chances that Disabilities Providers will be forced to support a representative in violation of their rights. Indeed, it is only because of EO 2009-15 that the Providers are under this threat at all.

The First Amendment exists to protect individual rights from the tyranny of the majority. *See Sullivan*, 376 U.S. at 270. The Seventh Circuit disregarded the Providers' interests in not having their constitutional right to free association put to repeated votes under EO 2009-15. For these reasons, the Court should also grant review on the second question presented.

CONCLUSION

A political system predicated on citizens choosing their representatives in government cannot tolerate government choosing representatives for its citizens. Illinois' policy of compelling personal care providers to support a particular advocate to petition the State about its Medicaid programs must be recognized as unconstitutional under the First Amendment. Otherwise, similar policies will continue to spread throughout the nation. The petition for writ of certiorari should be granted.

Respectfully submitted,

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29 November 2011

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

No. 10-3835

PAMELA J. HARRIS, *et al.*,
Plaintiffs-Appellants,

v.

GOVERNOR PAT QUINN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ILLINOIS, *et al.*,
Defendants-Appellees.

Argued June 9, 2011
Decided Sept. 1, 2011

Before MANION, WOOD, and HAMILTON, *Circuit Judges*.

MANION, *Circuit Judge*.

The plaintiffs in this appeal provide in-home care for people with varying levels of disabilities and other health needs. They present a narrow question: Does a collective bargaining agreement that requires Medicaid home-care personal assistants to pay a fee to a union representative violate the First Amendment, regardless of the amount of those fees or how the union uses them? We hold that it does not. Because the personal assistants are employees of the State of Illinois, at least in those respects relevant to collective bargaining, the union's collection and use of fair share fees is permitted by the Supreme Court's man-

datory union fee jurisprudence in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). However, we lack jurisdiction to consider the claims of plaintiffs who have opted not to be in the union. Because they are not presently subject to mandatory fair share fees, their claims are not ripe.

I.

The plaintiffs in this case all provide in-home care to disabled individuals through Medicaid-waiver programs run by the Illinois Department of Human Services. Some are part of the Home Services Program administered by the Division of Rehabilitation Services. The others are part of the Home Based Support Services Program administered by the Division of Developmental Disabilities. We will call these groups the Rehabilitation Program plaintiffs and Disabilities Program plaintiffs respectively.

A. *Home-Based Medicaid Waiver Program Features*

These programs subsidize the costs of home-based services for disabled patients who might otherwise face institutionalization. The programs offer flexibility and self-direction for services that are tailored to patients' individual needs. In the Rehabilitation Program, each patient works with a counselor to develop an individual service plan, which specifies "the type of service(s) to be provided to the patient, the specific tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, [and] the rate of payment for the service(s)." 89 Ill. Admin. Code 684.50. The service plan must be certified by the patient's physician and approved by the State. *Id.* § 684.10.

Once a counselor identifies the type of personal assistant the patient needs for the service plan, the patient is free to select almost any personal assistant who meets the qualifications set by the State. *Id.* §§ 684.20, 684.30 The State, in turn, requires personal assistants to comply with age and work-hour limitations, provide written or oral recommendations from past employers, have related work experience or training, and satisfy the patient and counselor that they can communicate and follow directions. *Id.* § 686.10. Personal assistants sign employment agreements directly with patients, although the terms of the agreement are set by the State. *Id.* The State sets wages and pays personal assistants directly, withholding Social Security as well as federal and state taxes. *Id.* §§ 686.10, 686.40.

The Disabilities Program functions similarly. Each patient works with a State "service facilitator" to develop a "service/treatment plan." 59 Ill. Admin. Code 117.120, 117.225(a). The State then pays for services provided under the plan, including personal care services. *Id.* at 117.215. The record is much less developed on the exact relationship between the State and the Disabilities Program personal assistants. And for good reason: the district court dismissed the claims on jurisdictional grounds, so no court has yet considered the merits of those claims.[1]

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[1] The details of the relationship between the State and the Disabilities Program personal assistants are unimportant for this appeal. As elaborated *infra*, we agree with the district court that the Disabilities Program claims are not yet ripe. But even if the claims were ripe, we would not consider the merits at this stage because the defendants have not cross-appealed seeking an expanded judgment on the merits. *See Greenlaw v. United States*, 554 U.S. 237, 128 S.Ct. 2559, 2564, 171 L.Ed.2d 399

B. *Rehabilitation Program Unionization*

In the mid-1980s, personal assistants in the Rehabilitation Program sought to unionize and, under the Illinois Public Labor Relations Act, collectively bargain with the State. The State Labor Relations Board, however, found that the personal assistants were in a unique employment relationship and that it lacked jurisdiction over that relationship because the State was not their sole employer. The personal assistants thus could not unionize until 2003, when the Illinois Public Labor Relations Act was amended to designate "personal care attendants and personal assistants working under the Home Services Program" as State employees for purposes of collective bargaining. 20 Ill. Comp. Stat. 2405/3. Then-Governor Blagojevich issued an executive order directing the State to recognize an exclusive representative for Rehabilitation Program personal assistants if they designated one by majority vote and to engage in collective bargaining concerning all employment terms within the State's control. According to the Governor, this was important because each patient employed only one or two personal assistants. Thus, only the State could control the economic terms of employment and the widely dispersed personal assistants could not "effectively voice their concerns" about the program or their employment terms without representation.

Later that year, a majority of the approximately 20,000 Rehabilitation Program personal assistants voted to designate SEIU Healthcare Illinois & Indiana as their collective bargaining representative with the

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(2008) ("Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party. . . . [without] a cross-appeal.").

State. The Union and the State negotiated a collective bargaining agreement which sets the pay rates, creates a health benefits fund for personal assistants, and establishes a joint Union-State committee to develop training programs. The agreement also contains other typical collective bargaining agreement provisions, including the union security clause that has given rise to this lawsuit and appeal. This "fair share" provision requires "all Personal Assistants who are not members of the Union . . . to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment."

C. *Disabilities Program Attempted Unionization*

In 2009, Governor Pat Quinn issued an executive order directing the State to recognize an exclusive representative for the Disabilities Program personal assistants, if a majority so chose. *See* Ill. Exec. Order 2009-15. SEIU Local 713 petitioned for an election to become that representative, and AFSCME Council 31 intervened in the election as a rival candidate. In a mail ballot election, however, a majority of the approximately 4,500 Disabilities Program personal assistants rejected representation by either union. But that victory is not permanent: the unions can request new elections in the future, and, under Illinois labor law, may bypass an election altogether if they collect a sufficient number of union cards from the personal assistants. *See id.;* 80 Ill. Admin. Code 1210.100(b).[2]

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[2] While the plaintiffs allege that the unions have used coercive tactics to get them and others to join, and to lobby state officials, the constitutional claim in this appeal is confined to the payment or potential payment of the fair share requirement.

D. *Current Litigation*

The following year, the personal assistants from both groups filed a two-count complaint against the Governor and the three unions involved. The Rehabilitation Program plaintiffs claimed that the fair share fees they were required to pay violated the First Amendment by compelling their association with, and speech through, the Union. The Disabilities Program plaintiffs argued that although they did not yet pay fees, they are harmed by the mere threat of an agreement requiring fair share fees. The district court dismissed the Rehabilitation Program plaintiffs' claims for failure to state a claim upon which relief could be granted. It dismissed the Disabilities Program plaintiffs' claims for lack of subject matter jurisdiction because they lacked standing and their claims were not ripe. The plaintiffs appeal both dismissals.

II.

The two sets of plaintiffs in this case stand in very different positions. The Rehabilitation Program plaintiffs are currently subject to a collective bargaining agreement that requires them to pay fair share fees to their union representative. The Disabilities Program plaintiffs have successfully rejected unionization and are not subject to fair share fees, but fear that may change at any time. This difference has important consequences: we have jurisdiction to consider the Rehabilitation Program plaintiffs' claims, which we discuss in the first part of the analysis. But we must dismiss the Disabilities Program plaintiffs' claims for lack of jurisdiction because they are not ripe for adjudication. We explain these holdings in order.

A. *Rehabilitation Program Claims*

The Rehabilitation Program plaintiffs mount a facial challenge to the fair share fees. That is, they do not allege that the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining.[3] Their only argument is that they may not be forced to financially support collective bargaining with the State under any circumstances. They present a two-step argument. First, they argue that this case does not fall under the line of Supreme Court cases permitting mandatory fees to support collective bargaining representation because personal assistants are employed by individual Medicaid patients, not the State. Second, they argue that no compelling state interests justify extending these collective bargaining cases to reach personal assistants.

We first set out the controlling precedent. The Supreme Court has long approved collective bargaining agreements that compel even dissenting, non-union members to financially support the costs of collective bargaining representation, as well as other closely related costs, as long as they are not used to support political candidates or views, or other ideological causes. First in *Railway Employees' Dep't v. Hanson*, the Court refused to enjoin a "union shop" agreement between a railroad company and a union that required all employees of the railroad to become nominal, dues-paying members of the union as a con-

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[3] The plaintiffs do argue that in the Medicaid context, collective bargaining with the State amounts to political advocacy. The Supreme Court has rejected this argument in the employment context, so it falls with our conclusion that personal assistants are State employees. *See generally, Abood*, 431 U.S. 209, 97 S.Ct. 1782.

dition of employment.[4] 351 U.S. at 227, 76 S.Ct. 714. Although a "right to work" provision in the Nebraska Constitution outlawed such agreements, the Court held that the federal Railway Labor Act permitted union shop agreements and thus superseded state law to the contrary. Along the way, it held that this provision of the Act was justified by Congress's interest in supporting "industrial peace and stabilized labor-management" and in distributing the costs of collective bargaining to all those who benefit from it. *Id.* at 234, 238, 76 S.Ct. 714. It declined to consider hypothetical First Amendment issues that might arise if the union engaged in partisan or ideological speech. *Id.* at 238, 76 S.Ct. 714.

Then, in *Abood v. Detroit Bd. of Educ.*, the Court extended the scope of its holding in *Hanson* to include public employees and attempted to set out limits on the use of fees collected from dissenting employees. 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261. It held that an "agency shop" clause in an agreement between the Detroit Board of Education and its teachers' union could require teachers who were not union members to financially support the union's collective bargaining, contract administration, grievance-adjustment procedures, and other activities "germane to its duties as

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[4] In a "union shop," an "employer may hire nonunion employees on the condition that they join a union within a specified time"; in an "agency shop," discussed below, "a union acts as an agent for the employees, regardless of the union membership." *Black's Law Dictionary* 1504 (9th ed.2009). The Supreme Court has treated union and agency shops as "practical equivalent[s]." *See Abood*, 431 U.S. at 219 n. 10, 97 S.Ct. 1782. In an open shop, union membership is permitted but is not a condition of securing or maintaining employment. Under a state right-to-work law, "employees are not to be required to join a union as a condition of receiving or retaining a job." *Black's* at 1504.

collective-bargaining representative." *Id.* at 232, 235, 97 S.Ct. 1782. Since *Abood*, the Court has continued to refine its approach to the appropriate use of fees from non-union members in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) (outlining appropriate procedures to protect non-member fees), and *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (elaborating specific charges that can and cannot be funded with union donations). But it has not wavered from its position that, as a general matter, employees may be compelled to support legitimate, non-ideological, union activities germane to collective-bargaining representation.

Against this backdrop, we next consider whether the personal assistants are, as the defendants contend, State employees. If so, this case is controlled by *Abood* and the plaintiffs' claims fail. As an initial matter, we note that we pay no particular heed to the State legislature's designation of personal assistants as State employees solely for purposes of collective bargaining under Illinois law. *See* 20 Ill. Comp. Stat. 2405/3(f). The label affixed by a state, whether in statute, regulation, or order, is not sufficient to designate the relationship "employment." Whether someone is an employee of the state has a host of implications—under both state and federal law—beyond whether mandatory union fees are permitted. Because of this, the Illinois legislature may have designated personal assistants as employees or not for reasons entirely unrelated to compelled speech under the First Amendment. Rather than accept either party's characterization of the relationship, we must consider the relationship itself and decide whether the State is an employer for purposes of compelling support for collective bargaining.

Two sources inform our analysis. First, neither *Hanson* nor *Abood* discusses the definition of employer, so we will assume the Court meant to give the word its ordinary meaning: "A person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages." *Black's* at 604. Second, we draw from labor relations law the notion that more than one person or company may be an individual's employer. *Cf. Boire v. Greyhound Corp.*, 376 U.S. 473, 481, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964) (discussing joint employment determination by NLRB); *DiMucci Const. Co. v. NLRB*, 24 F.3d 949, 952 (7th Cir.1994) (listing factors courts consider in reviewing an NLRB determination of joint employment). We are aware of no cases specifically discussing *Abood* in a joint-employment situation. But it is not an uncommon situation for a single individual to find himself with more than one employer for the same job. This undermines the plaintiffs' attempt to distinguish between the typical employer-employee relationship, on one hand, and every other imaginable labor relationship, on the other. Thus, both the home-care patient and the State may be employers if they each exercise significant control over the personal assistants.

And in the Rehabilitation Program, the State does have significant control over virtually every aspect of a personal assistant's job. While the home-care regulations leave the actual hiring selection up to the home-care patient, the State sets the qualifications and evaluates the patient's choice. 89 Ill. Admin. Code § 686.10. And while only the patient may technically be able to fire a personal assistant, the State may effectively do so by refusing payment for services provided by personal assistants who do not meet the State's standards. *Id.* § 677.40. When it comes to con-

trolling the day-to-day work of a personal assistant, the State exercises its control by approving a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions and annually reviews each personal assistant's performance. *Id.* §§ 686.10, 686.30. Finally, the State controls all of the economic aspects of employment: it sets salaries and work hours, pays for training, and pays all wages—twice a month, directly to the personal assistant after withholding federal and state taxes. *Id.* In light of this extensive control, we have no difficulty concluding that the State employs personal assistants within the meaning of *Abood*.

The plaintiffs raise two objections. First, they claim that the patient, not the State, employs them. But as we have explained, even if the patient is properly considered an employer, that would not prevent the State from being a joint employer. Second, they argue that, however we characterize the State's relationship with personal assistants, the interests in collective bargaining that *Abood* identified does not apply here. They claim that the differences between the personal assistants here and the typical employment situation at issue in *Abood* undermine the State's claimed interest in labor peace. Specifically, the plaintiffs characterize *Abood*'s labor peace interest thus: "that disruptions caused by diverse employee expressive association within a workplace could be solved by giving a union a monopoly over employee speech vis-à-vis their employer." Pl. brief at 20. Thus, they assert that because the personal assistants are "outside the workplace" and they cannot be compelled

to speak to the State with a single voice, the labor peace interest does not apply.[5]

We do not accept the plaintiffs' narrow characterization of the labor peace interest. In *Hanson*, the Supreme Court reasoned that "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex" and a question of policy outside of the judiciary's concern. 351 U.S. at 234, 76 S.Ct. 714. The Court thus envisioned labor peace to include "stabilized labor-management relations," which are at issue in any employer-employee relationship, regardless of whether employees share the same workplace. The Court expanded its description of labor peace in *Abood:*

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension with the work force and eliminating the advantages of employee collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

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[5] The plaintiffs further argue that outside the workplace, the government has no lawful interest in quelling diverse, even disruptive, speech or association. But we do not understand the complaint to allege that the State has quelled any of the plaintiffs' speech, merely that they have been forced to financially support a single bargaining representative. Employee speech jurisprudence is entirely distinct from that of compelled association, as are the interests that justify (or not) each respective intrusion into employees' freedom of speech.

431 U.S. at 224, 97 S.Ct. 1782. Given our conclusion that the State employs the personal assistants, with extensive control over the terms and conditions of employment, and has chosen (wisely or not) to establish some of those terms and conditions through negotiation rather than regulation, the interests identified by the Court in *Abood* are identical to those advanced by the State in this case. The plaintiffs' attempts to distinguish *Abood* are unavailing.

Thus, because of the significant control the state exercises over all aspects of the personal assistants' jobs, we conclude that personal assistants are employees of the State and reject the plaintiffs' arguments that the State's interests in collective bargaining do not apply to the unique circumstances of personal assistants. As such, the fair share fees in this case withstand First Amendment scrutiny—at least against a facial challenge to the imposition of the fees itself.

We once again stress the narrowness of our decision today. We hold that personal assistants in the Illinois home-care Medicaid waiver program are State employees solely for purposes of applying *Abood*. We thus have no reason to consider whether the State's interests in labor relations justify mandatory fees outside the employment context. We do not consider whether *Abood* would still control if the personal assistants were properly labeled independent contractors rather than employees. And we certainly do not consider whether and how a state might force union representation for other health care providers who are not state employees, as the plaintiffs fear. We hold simply that the State may compel the personal assistants, as *employees*—not contractors, health care providers, or citizens—to financially support a

single representative's exclusive collective bargaining representation.

B. *Disabilities Program Claims*

While the underlying legal issues raised by the Disabilities Program plaintiffs are similar to those we considered above, the district court dismissed their claims on ripeness and standing grounds. This is because the Disabilities Program plaintiffs are in a fundamentally different position. As we have noted, the Rehabilitation Program personal assistants have chosen to be represented by a union. Illinois is not a "right to work" state where paying dues for union membership is optional for each worker, and thus under state law the minority of caregivers opposed to the union may be required to pay their fair share of the dues used to bargain for pay, working conditions, and other universal benefits. The Disabilities Program personal assistants, on the other hand, have opted not to have union representation. By exercising that option, they have prevented collective bargaining and are not required to pay any fair share requirement. But because they are not subject to an agreement mandating fair share payments, we agree with the district court that the Disabilities Program plaintiffs' claims are not ripe, and we lack jurisdiction to consider the complaint.

A claim is not ripe if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir.2008) (quoting *Texas v. United States*, 523 U.S. 296, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)). The Disabilities Program plaintiffs complain of the same conduct as the Rehabilitation Program plaintiffs: that one of the unions and the State will enter into an agreement that will require all personal

assistants to pay a fair share fee to support that union's collective bargaining activity. But unlike the Rehabilitation Program, the Disabilities Program personal assistants have rejected union representation, and there is no certainty that the Disabilities Program personal assistants will ever unionize. Hence, the State has no representative to recognize and cannot agree to compel the plaintiffs to pay fair share fees at all. The plaintiffs' claims are contingent on events that may never occur and thus are not ripe.

The plaintiffs argue that the very existence of the executive order committing the State to recognizing an exclusive union representative makes it significantly more likely that the plaintiffs will be forced to financially support that union's speech. Thus, there is a reasonable probability of future harm to the plaintiffs' constitutional interests, which the plaintiffs feel they should not have to spend resources to defeat. And they argue the courts can redress this harm by declaring that the plaintiffs may not be compelled to support a union, and by enjoining the State from enforcing its laws and executive orders in such a way that compels the plaintiffs to support a union.

But the plaintiffs do not allege that the mere existence of the executive order violates their rights, only that it makes such a violation more likely. Their argument thus confuses this increased likelihood of a future *violation* of their constitutional rights with the probabilistic future *harm* which is sufficient to meet the minimal injury-in-fact requirements of standing. The cases on which the plaintiffs rely stand only for the rule that a constitutional violation now may merely increase the likelihood of injury later. That would be a question of constitutional standing and inapplicable to the issue of ripeness we have before

us. *E.g., Southworth v. Board of Regents*, 307 F.3d 566, 580-81 (7th Cir.2002) (students had standing to challenge a facially unconstitutional system for allocating student fees); *Majors v. Abell*, 317 F.3d 719, 721-22 (7th Cir.2003) (candidates had standing to challenge unconstitutional regulation of political ads despite lack of enforcement); *Mulhall v. UNITE Local 355*, 618 F.3d 1279, 1286-87 (11th Cir.2010) (employee had standing to challenge unlawful agreement to facilitate unionization despite possibility that it would never occur). This case is different because the only violations alleged by the plaintiffs may never occur.

The plaintiffs feel burdened fighting to prevent what they view as an unconstitutional collective bargaining agreement. But many individuals and organizations spend considerable resources fighting to prevent Congress or the state legislatures from adopting legislation that might violate the Constitution. The courts cannot judge a hypothetical future violation in this case any more than they can judge the validity of a not-yet-enacted law, no matter how likely its passage. To do so would be to render an advisory opinion, which is precisely what the doctrine of ripeness helps to prevent. *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir.2008) ("[R]ipeness, when it implicates the possibility of this Court issuing an advisory opinion, is a question of subject matter jurisdiction under the case-or-controversy requirement.").

The district court did err in one respect however. After holding that the Disabilities Program plaintiffs' claims were not yet ripe, it dismissed the complaint with prejudice. Generally, when a complaint is dismissed because it is not ripe (or because the plaintiffs lack standing, for that matter) it is dismissed without prejudice unless it appears beyond a doubt that there

is no way the plaintiffs' grievance could ever mature into justiciable claims. *Chattanoga Mfg., Inc. v. Nike, Inc.*, 301 F.3d 789, 796 (7th Cir.2002) (holding that district court erred in dismissing counterclaims with prejudice because "[i]f a dispute ripens between the parties, [the counterclaimant] should have the opportunity to litigate its claims."). If the Disabilities Program personal assistants ever do vote to unionize and enter an agreement with the State mandating fair share fees, the plaintiffs will have a ripe claim. Given our holding above, it may be that such a claim will not last long, but we will not prejudge the issue in this case. Therefore, we will remand the case to the district court with instructions to dismiss the claims of the Disabilities Program plaintiffs without prejudice.

III.

For these reasons, we reject the plaintiffs' First Amendment claims. The Disabilities Program plaintiffs do not allege that a constitutional violation has yet occurred. Thus, their claim is not ripe and we lack jurisdiction to consider it. But because the claim is unripe, it should be dismissed *without* prejudice, so we remand with instructions for the district court to correct the order of dismissal. The Rehabilitation Program plaintiffs do allege a justiciable claim, but we reject it on the narrow grounds that Supreme Court precedent permits the State, as a joint employer, to compel fair share fees in the interest of stable labor relations. The judgment of the district court is therefore AFFIRMED in part and REMANDED in part with instructions.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS,
EASTERN DIVISION

No. 10-cv-02477

PAMELA J. HARRIS, ELLEN BRONFELD, CAROLE GULO, MICHELLE HARRIS, WENDY PARTRIDGE, THERESA RIFFEY, GORDON P. STIEFEL, SUSAN WATTS, PATRICIA WITHERS, STEPHANIE YENCER-PRICE, AND A CLASS OF SIMILARLY SITUATED,
Plaintiffs,

v.

GOVERNOR PAT QUINN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ILLINOIS, SEIU HEALTHCARE ILLINOIS & INDIANA, SEIU LOCAL 73, AND AFSCME COUNCIL 31,
Defendants.

Nov. 12, 2010

MEMORANDUM OPINION AND ORDER

SHARON JOHNSON COLEMAN, *District Judge*.

In this proposed class action lawsuit, Plaintiffs are individuals who provide in-home care to disabled participants in one of two Illinois Medicaid-waiver programs: (1) the Home Services Program administered by the Division of Rehabilitation Services of the Illinois Department of Human Services ("Rehabilitation

Program"); or (2) the Home Based Support Services Program for Mentally Disabled Adults administered by the Division of Developmental Disabilities of the Illinois Department of Human Services ("Disabilities Program"). Plaintiffs Theresa Riffey, Susan Watts, and Stephanie Yencer-Price ("Rehabilitation Plaintiffs") provide services to disabled participants in the Rehabilitation Program and allege that Defendant SEIU Healthcare Illinois & Indiana ("SEIU HII") violated the constitutional rights of these Plaintiffs by compelling them to pay SEIU HII compulsory union fees. Plaintiffs Pamela J. Harris, Ellen Bronfeld, Michelle Harris, Carole Gulo, Wendy Partridge, and Patricia Withers ("Disabilities Plaintiffs")[1] provide services to disabled participants in the Disabilities Program. The Disabilities Plaintiffs allege that Defendants Governor Pat Quinn ("Governor Quinn"), SEIU Local 73, and AFSCME Council 31 ("AFSCME") violated the constitutional rights of the Disabilities Plaintiffs by threatening to compel them to financially support either SEIU Local 73 or AFSCME. The Rehabilitation Plaintiffs and the Disabilities Plaintiffs seek monetary damages, injunctive relief, and a declaratory judgment that certain conduct, portions of two Illinois Executive Orders, and an Illinois Public Act are unconstitutional. In a consolidated motion, all Defendants moved for dismissal of Counts I and II pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) respectively. (Dkt. No. 30.) Defendants SEIU Local 73 and AFSCME moved for dismissal on the additional basis that the claims against them fail to establish state action. Governor Quinn moved for dismissal of any claim seeking mon-

[1] Plaintiffs have filed notice with the Court of the voluntary dismissal of Gordon P. Stiefel. (Dkt. No. 49.)

etary damages against him on the additional basis of the immunity protections provided by the Eleventh Amendment. The Court conducted a hearing on the pending motion on November 5, 2010. For the reasons stated below, the Court grants Defendants' Consolidated Motion to Dismiss.

I. Factual Background

The Plaintiffs are providers of home care service to disabled individuals enrolled in either the Disabilities Program or the Rehabilitation Program.[2] (Dkt. No. p. 2.) Both programs are Medicaid-waiver programs administered by the Illinois Department of Human Services, which subsidize the costs of providing home-based services to individuals with severe disabilities. (*Id.* at ¶¶ 7, 13.) The Plaintiffs provide personal care and certain health care services to program participants to allow the participants to remain in their homes and prevent their unnecessary institutionalization. (*Id.*) The program participants may select and hire any provider who meets certain minimum requirements as set by the State of Illinois ("State"). (Compl. ¶¶ 10, 16.) The participants supervise, discipline, and control certain terms and conditions of the providers they hire. (*Id.*) The State subsidizes a participant's cost of hiring a provider, ensures that providers meet certain minimum requirements, and controls the economic terms of the providers' employment. (Compl.¶¶ 10-11, 17.)

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[2] Providers in the Rehabilitation Program are generally referred to as "personal assistants" while providers in the Disabilities Program are generally referred to as "individual providers." (Dkt. No. 1 ¶¶ 9, 31.)

A. Providers in The Rehabilitation Program

In March 2003, former Illinois Governor Blagojevich issued "Executive Order on Collective Bargaining By Personal Assistants" ("EO 2003-08"), which recognized that the State was not the "sole employer" of the personal assistants who provide home services under the Rehabilitation Program. (Dkt. No. 32-1.) EO 2003-08 also recognized the importance of preserving the participants' "control over the hiring, in-home supervision, and termination of the personal assistants" while at the same time preserving the "State's ability to ensure efficient and effective delivery of personal care services and [to] control the economic terms of the personal assistants' employment." (*Id.*) In recognition of these twin objectives, EO 2003-08 provided that the State shall recognize a representative designated by the majority of the personal assistants as the exclusive representative of all personal assistants for the purposes of engaging in collective bargaining with the representative concerning the terms and conditions of employment "that are within the State's control." (*Id.;* Compl. ¶ 20.)

In July 2003, the Illinois General Assembly codified EO 2003-08 by enacting Public Act 0903-204, An Act Concerning Disabled Persons ("the 2003 Act"), which amended Section 3 of the Disabled Persons Rehabilitation Act. (Compl. ¶ 21; Dkt. No. 32-10.) Section 3(f) of the 2003 Act provided:

> [P]ersonal assistants providing services under the Department's Home Services Program shall be considered to be public employees and the State of Illinois shall be considered their employer. (Dkt. No. 32-10.)

The 2003 Act also provided for a "Fair share agreement" which required all employees in a collective bargaining unit to pay "their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and other conditions of employment." (*Id.* at Sect. 3(g).) The fair share agreement specifically excluded payment of "any fees for contributions related to the election or support of any candidate for political office." (*Id.*)

Shortly after the 2003 Act was enacted, the majority of personal assistants in the Rehabilitation Program designated SEIU HII as the exclusive representative for all personal assistants and the State and SEIU HII subsequently entered into a collective bargaining agreement ("CBA") effective August 1, 2003 to December 31, 2007. (Compl.¶¶ 22-24.) In 2008, the State and SEIU HII entered into a new CBA effective January 1, 2008 to June 30, 2012. (*Id.* at ¶ 24; Dkt. No. 32-3 p. 2.) The CBA allows the State, upon the written authorization of the personal assistant, to deduct union dues and initiation fees from the personal assistant's wages and remit such fees to SEIU HII. (Dkt. No. 32-3 p. 8.) The CBA also contains a fair share provision in Section 6 of Article X, which tracks the language in the 2003 Act and requires that all personal assistants who are not SEIU HII members pay "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours, and other conditions of employment." (Compl. ¶ 25; Dkt. No. 32-4 p. 7.)

The Rehabilitation Plaintiffs are personal assistants in the Rehabilitation Program who have either paid union dues or fair share fees through payroll de-

ductions that were ultimately remitted to SEIU HII. (Compl.¶ 38.) The Rehabilitation Plaintiffs allege that they, and other similarly situated personal assistants, are compelled to financially support SEIU HII for purposes of speaking to, petitioning, and otherwise lobbying the State with respect to the Rehabilitation Program and that the compelled association abridges their right to freedom of association, freedom of speech, and to petition the government for redress of grievances under the First Amendment to the United States Constitution, in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. (Compl.¶ 46.)

B. Providers in the Disabilities Program

On June 29, 2009, Governor Quinn issued Executive Order 2009-15 ("EO 2009-15" or "the Order") titled "Collective Bargaining By Individual Providers of Home-Based Support Services." (Compl. ¶ 31; Dkt. No 32-2.) EO 2009-15 recognized that the individual providers of home-based services under the Disabilities Program are not State employees but that the "State controls the economic terms of their provision of services." (Dkt. No. 32-2 p. 2.) The Order also recognized the fact that the State had productively dealt with an exclusive representative of personal assistants in the Rehabilitation Program for many years. (*Id.*) EO 2009-15 authorized the State to recognize a representative designated by the majority of the individual providers in the Home-Based Support Services Program as the exclusive representative for collective bargaining purposes. (Compl ¶ 31.)

In October 2009, Defendants SEIU Local 73 and AFSCME unsuccessfully attempted to become the exclusive representative of the individual providers in the Disabilities Program. (*Id.* ¶ 32.) As a result, the

individual providers in the Disabilities program are not represented by any union. (*Id.* at 33.) The Disabilities Plaintiffs allege that they devoted time, and in some cases money, to campaign against union representation. (*Id.* at 35.) These Plaintiffs also allege that SEIU Local 73 and AFSCME are continuing their efforts to become the exclusive representative pursuant to EO 2009-15 and that these ongoing efforts threaten to violate the constitutional rights of the Disabilities Plaintiffs and others similarly situated. (*Id.* at ¶¶ 36-37.)

II. Standard of Review

A. Motion To Dismiss for Failure To State a Claim

A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. *Christensen v. County* of Boone, 483 F.3d 454, 458 (7th Cir.2007). Pursuant to the federal notice pleading standard, a complaint need only provide a short and plain statement of the claim showing that the plaintiff is entitled to relief and sufficient to provide the defendant with fair notice of the claim and its basis. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008). When evaluating the sufficiency of a complaint, a district court must construe the complaint in the light most favorable to the nonmoving party. *Id.* The Supreme Court has described the bar that a complaint must clear for purposes of Rule 12(b)(6) as follows: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, — U.S. —, —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). For a claim to have facial plausibility, a

plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* As such, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

A Rule 12(b)(6) motion must be decided solely on the face of the complaint and any attachments that accompanied its filing. *Miller v. Herman*, 600 F.3d 726, 732 (7th Cir.2010). Pursuant to Federal Rule of Civil Procedure 12(d), a district court cannot consider material outside of the complaint and its attachments without converting a Rule 12(b)(6) motion to a motion for summary judgment. *See* Fed. R. Civ. P 12(d) ("[i]f on motion under Rule 12(b)(6) or 12(c)), matters outside of the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment"). A court may, however, consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment. *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir.1998). Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper. *Id.; see also* Fed.R.Evid. 201.

B. Motion to Dismiss for Lack of Subject Matter Jurisdiction

When reviewing a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a district court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir.1999). The district court is not, however, bound to accept as true the allegations of the complaint which tend to establish jurisdiction

where an opposing party properly raises a factual question concerning the jurisdiction of the district court to proceed with the action. *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir.1979). The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists. *Long*, 182 F.3d at 554.

C. Request for Judicial Notice

Documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the complaint and are central to the claims. *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir.1998). Defendants requested that the Court take judicial notice of ten documents in support of their motion to dismiss. (Dkt. No. 32.) Plaintiffs do not oppose Defendants' request for judicial notice and indeed the Complaint relies upon several of the documents presented by the Defendants in their request for judicial notice. (*See* Dkt. No. 1 ¶¶ 20, 21, 24, 31.) The Court therefore takes judicial notice of the following documents because they are matters of public record and because they are central to Plaintiffs' claims: (1) Executive Order No.2003-8 (Defendants' Request for Judicial Notice ("RJN"), Ex. A); (2) Executive Order No.2009-15 (*id.* at Ex. B); (3) Collective Bargaining Agreement between SEIU HII and the State of Illinois effective January 1, 2008 to June 30, 2012 (*id.* at Ex. C); (4) Collective Bargaining Agreement between SEIU HII and the State of Illinois effective August 1, 2003 to December 31, 2007) (*id.* at Ex. D); and (5) Illinois Public Act 93-0204 (2003) (*id.* at Ex. J). The Court also takes judicial notice of the August 30, 2002 Order in *West v. Serv. Employees*

Int'l Union Local 434B in the United States District Court for the Central Division of California, Western Division, (*id.* at Ex. F). *See, e.g., Opoka v. INS*, 94 F.3d 392, 394 (7th Cir.1996) ("it is a well-settled principle that the decision of another court or agency . . . is a proper subject of judicial notice"). The Court declines to take judicial notice of the April 11, 2009 Arbitration Decision (RJN, Ex. E), the December 18, 1985 decision of the Illinois State Labor Relations Board (*id.* at Ex. G), the April 23, 2007 decision of the Illinois Labor Board (*id.* at Ex. H), and the March 18, 2002 decision of the State of Illinois Industrial Commission (*id.* at Ex. I) because Defendants have not established that these documents are necessary for resolution of their motion.

III. Analysis

A. Count I—Rehabilitation Plaintiffs

Count I, asserted on behalf of the Rehabilitation Plaintiffs, alleges the system of exclusive representation established by the State that allows Defendant SEIU HII to impose and collect fair share fees violates the Plaintiffs' First Amendment rights. Defendants move for dismissal of Count I alleging that the U.S. Supreme Court has held that collective bargaining arrangements permitting fair share fees are consistent with the First Amendment. (Dkt. No. 31 p. 13.) Defendants claim that a long and unbroken line of Supreme Court cases about collective bargaining have held that such arrangements are justified by the state's legitimate interest in establishing a harmonious system for labor relations. (*Id.*) Defendants also argue fair share fees have been found to fairly distribute the costs associated with collective bargaining among all who benefit to avoid the risk of "free riders." (*Id.*) Defendants rely upon *Hanson*

and its progeny for the proposition that exclusive representation arrangements, while imposing some burden on an individual's First Amendment rights, are justified by the employer's interest in "labor peace." *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225, 238, 76 S.Ct. 714, 100 L.Ed. 1112 (1961) (holding "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work" does not violate the First Amendment); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (holding fair share fees used to finance expenditures germane to collective bargaining serve an important government interest in labor relations and are constitutionally justified); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (holding that a union could constitutionally charge dissenting employees for their share of union activities appurtenant to collective bargaining and contract implementation). Defendants find additional support in a recent decision dismissing a similar action on nearly identical facts. (Order Granting SEIU Local 434B's Motion to Dismiss Counts One Through Four, *West v. Serv. Employees Int'l Union Local 434B*, No. 01-cv-10862-CAS-FMO (C.D.Cal. Aug. 30, 2002), submitted as RJN, Ex. F.)

As noted by the Defendants, the Supreme Court has held that employees can be required to contribute fair share fees to compensate unions for their representational activities. *See, e.g., Lehnert*, 500 U.S. at 519. A line is drawn for First Amendment purposes between fair share fees, which pay for representational or collective-bargaining activities, and full union dues that often support nonrepresentational activities. Unions cannot force employees to pay for "the support of ideological causes not germane to its

duties as collective-bargaining agent." *See Abood*, 431 U.S. at 235-36; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 294, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). In a recent decision, the Seventh Circuit explained that fair share fees are permitted under the First Amendment because this forced speech promotes peaceful labor relations and serves legitimate government purposes for the benefit of both union members and non-members. *Kingstad v. State Bar of Wisc.*, No. 09-4080 (7th Cir. Sept. 9, 2010) (slip opinion pp. 10-11). Without a showing that fair share fees are used to fund ideological conformity or imposed for reasons unrelated to collective bargaining, these fees do not violate the First Amendment. *Hanson*, 351 U.S. at 235-38.

Plaintiffs do not deny that fair share fees in the collective bargaining context have been found constitutional. Rather, Plaintiffs argue that the exclusive representation arrangement here is "nothing short of compulsory political representation" that violates Plaintiffs' First Amendment rights by compelling them to support a state-designated entity for purposes of lobbying the State for additional benefits from a government program. (Dkt. No. 33 at pp. 9-10.) Plaintiffs also allege that fair share fees imposed under this arrangement are not justified by a vital government interest.

The Plaintiffs' claim that they are compelled by the State to support a state-designated representative to speak on their behalf for the purpose of getting more benefits from a government program is unsound. First, the State did not designate any entity to serve as the Plaintiffs' exclusive representative. Instead, as set forth in the Complaint, the State "recognize[d] a representative designated by a majority of the

personal assistants as the exclusive representative of all personal assistants." (Dkt. No. 1 ¶ 20.) Second, the Complaint alleges that the disabled individuals, not the Plaintiffs, are the recipients of a government program that subsidizes the cost of their in-home care. (Dkt. No. 1 ¶¶ 2-3, 7, 13.) Third, the Complaint is bereft of any allegation that the Plaintiffs are prevented from independently lobbying the State for any purpose. Finally, the authorities that Plaintiffs cite to support their claim found compelled support of beliefs or ideology unconstitutional; this is not the case that Plaintiffs find themselves in.[3] *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, 74-75, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (holding any personnel decisions based upon support of political party violate First Amendment); *Abood*, 431 U.S. at 233-34 (holding union fees that support ideological activities violate First Amendment); *Elrod v. Burns*, 427 U.S. 347, 356-57, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (holding policy that conditions employment on support of a political party violates First Amendment).

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[3] Plaintiffs filed a Citation to Supplemental Authorities in Support of Their Opposition to Defendants' Motion to Dismiss (Dkt. No. 39) after the close of briefing on the instant motion and without seeking leave of the Court. The filing consisted of a July 14, 2010 Order in *Schlaud v. Granholm*, Case No. 10-cv-147 (Dkt. No. 32) pending in the United States District Court for the Western District of Michigan, along with excerpts from a July 13, 2010 hearing in the same matter. No reasoning was included in the July 14, 2010 Order. During the November 5, 2010 hearing in the case *sub judice*, Plaintiff's counsel conceded that he speculated as to the district court's reasoning in *Schlaud*. The Court declines to speculate about the court's reasoning in *Schlaud* and thus the Court will not consider this supplemental filing in ruling on Defendants' Consolidated Motion to Dismiss.

Defendants contend the State's legitimate interest in establishing effective collective bargaining justifies a system of exclusive representation and fair share fees. (Dkt. No. 31. p. 17.) Plaintiffs counter that such arrangements are only constitutional when justified by a vital government interest and that none exists here. (Dkt. No. 33. p. 11.) Plaintiffs once again rely upon *Elrod* and *Rutan*, both of which considered infringements on First Amendment rights outside of the collective bargaining environment.

Plaintiffs also claim *Lehnert* provides support for their claim. Plaintiffs' reliance upon *Lehnert*, however, is puzzling. The *Lehnert* plaintiffs were employees of a state college who challenged compelled union fees that were used for purposes *other* than collective bargaining. 500 U.S. at 513. In addressing plaintiffs' challenge, the Court first emphasized that its previous decisions recognized that the compelled financial support of a union's collective bargaining activities was constitutionally permissible. *Id.* at 516. The Court then articulated a three prong test for determining the range of fees that a union could constitutionally charge non-members consistent with the First Amendment. *Id.* at 519. Plaintiffs quote from a portion of this test when arguing that the State must demonstrate that a vital interest, rather than a legitimate interest as Defendants assert, justifies the fair share fees at issue here. (Dkt. No. 33 p. 11.) The full test set forth in *Lehnert* provides:

> [A]lthough the Court's decisions in this area prescribe a case-by-case analysis in determining which activities a union may constitutionally charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations . . . chargeable activities

> must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Lehnert, 500 U.S. at 519. Read in full context, *Lehnert* explains that the government's interest in labor peace and avoiding free riders is a vital government interest. While Defendants may have characterized the State's interest in establishing a harmonious system for labor relations as a legitimate interest, this interest is considered vital in accordance with Supreme Court precedent. Plaintiffs' claim that no vital interest exists here lacks merit.

Throughout the hearing, Plaintiff's counsel repeatedly referred to the collective bargaining activities before the Court as "lobbying." Counsel argued that collective bargaining absent an employer-employee relationship is lobbying and that since no employment relationship exists between the State and the personal assistants in the Rehabilitation Program, that the fair share fees here support compulsory lobbying. This argument is flawed as the Complaint alleges that: (1) the State pays the providers (Dkt. No. 1 ¶¶ 11, 26); (2) the State controls certain terms and conditions of the providers' employment (*id.* at ¶¶ 10-11, 22, 26); and (3) the 20,000 providers are considered State employees solely for the purpose of collective bargaining (*id.* at ¶¶ 12, 21).

Although Plaintiff's counsel provided no authority to support this argument, *Lehnert* provides guidance on the sometimes "hazy line" between lobbying and collective bargaining in the public sector. *Lehnert*, 500 U.S. at 518-520. The Court explained that in

public sector employment, unions must necessarily concern themselves not only with negotiations at the bargaining table but also with those activities necessary to ensure the agreement's implementation. *Id.* at 520. These additional activities include efforts to secure ratification and acquire appropriations from the proper state body. *Id.* These post-negotiating activities are "pertinent to the duties of the union as a bargaining representative" and are an "indispensable prerequisite" to ensuring contract implementation. *Id.* at 519-520. The Court recognized that the question of whether these additional activities are lobbying is "a close one." *Id.* at 520. The Court held, however, that employees may be constitutionally compelled to subsidize legislative lobbying within the context of contract ratification or implementation. *Id.* at 522. Thus, characterizing the fair share fees here as "compulsory lobbying" does not, without more, implicate any First Amendment concerns. *Id.* at 517.

Plaintiffs' also claim that the labor peace justification does not apply here because the personal assistants are not State employees. Yet, the personal assistants have been designated as public employees for the purpose of collective bargaining. (Dkt. No. 1 ¶ 19.) There can be no doubt that the State has a vital interest in establishing peaceful labor relations with the 20,000 personal assistants paid with State subsidized funds. Plaintiffs next argue that First Amendment values should predominate over the State's interest because a contrary approach would inflict harm by causing individuals to support views and beliefs against their will thereby harming the democratic process that the First Amendment protects. (Dkt. No. 33 p. 36.) Plaintiffs' argument fails because they have not alleged either in the Complaint or in their Opposition Motion that Plaintiffs have been

forced to support any ideology or viewpoint with which they disagree.

In their briefs, both Plaintiffs and Defendants refer to the order entered by the district court in *West v. SEIU Local 434B*. Defendants argue that *West* supports their claim that the system of collective bargaining established by the State of Illinois comports with the First Amendment while the Plaintiffs argue that *West* rests on faulty reasoning. (Dkt. No. 31 p. 26; Dkt. No. 33. p. 34.) While certainly not binding on this Court, we find the reasoning in *West* persuasive. The *West* plaintiffs provided in-home support services to low income elderly and disabled persons, who received benefits to fund these services through a statewide public entitlement program. (RJN, Ex. F at p. 4.) By statute, the plaintiff providers were designated as state employees and were thereby subject to an exclusive bargaining agreement, which permitted the defendant union to collect agency fees. (*Id.* at pp. 1-2.) The plaintiffs asserted a constitutional challenge to the statute alleging that it violated the First Amendment rights of the providers and impinged upon their right to free association. (*Id.* at 2.) The union sought dismissal arguing that the statutory framework was enacted to clarify that the public body was the employer of the providers for collective bargaining purposes only and that the program recipients were the employers of the providers for all other purposes. (*Id.* at 15.) The union also argued that under *Hanson* and *Abood*, the union could constitutionally collect agency fees to support the costs of collective bargaining. (*Id.* at 16-17.) The plaintiffs argued that the challenged statutory provisions constituted illegal content and viewpoint based regulations subject to strict scrutiny to be constitutional. (*Id.* at 18.) The plaintiffs further contended that no

public employer-employee relationship existed to justify an exclusive bargaining arrangement and that any such justification must be the least restrictive means available. (*Id.* at 20.)

The district court concluded that the plaintiffs were incorrect about the standard of scrutiny that applies to collective bargaining agreements. The court explained that "[i]t has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace." (*Id.* at 21.) The court found that the statutory framework classifying the providers as public employees subject to exclusive bargaining agreements was in accordance with longstanding Supreme Court precedent. (*Id.* at 22.) The district court dismissed the plaintiffs' claims with prejudice and noted that the plaintiffs failed to articulate any impermissible way in which the statutory scheme impinged upon their First Amendment rights. (*Id.* at 22-23.)

Similarly, Plaintiffs have not alleged that the exclusive representation system here has imposed any burden on Plaintiffs beyond supporting the collective bargaining arrangement from which they benefit. There are no allegations that the fair share fees here are used to support any political or ideological activities. The Complaint alleges only that the Rehabilitation Plaintiffs pay a compulsory fee to SEIU HII for "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." (Dkt. No. 1 ¶ 25.) These costs are constitutional under *Lehnert* and other longstanding Supreme Court precedent. The Complaint fails to state a plausible claim that the fair-share fee arrangement violates the First

Amendment and thus the Court dismisses Count I with prejudice.

B. Count II—Disabilities Plaintiffs

Count II, asserted on behalf of the Disabilities Plaintiffs, alleges that Defendants Governor Quinn, SEIU Local 73, and AFSCME have threatened to violate Plaintiffs' First Amendment rights by attempting to unionize the individual providers in the Disabilities Program. (Dkt. No. 1 pp. 16-17.) Defendants seek dismissal of Count II arguing that the Court lacks subject matter jurisdiction because the claim is not ripe and the Plaintiffs lack standing. (Dkt. No. 31 p. 33.) Plaintiffs counter that because the threat to their First Amendment rights is imminent, they have standing to enjoin enforcement of the statutory framework which would subject them to exclusive representation and fair share fees. (Dkt. No. 33 pp. 40-41.)

Article III of the U.S. Constitution limits the authority of the federal courts to "cases or controversies." From that requirement flow two closely related concepts: ripeness and standing. *Rock Energy Coop. v. Village of Rockton*, 614 F.3d 745, 748 (7th Cir.2010). Both of these doctrines bar a plaintiff from asserting an injury that depends on so many future events that a judicial opinion would be advice about remote contingencies. *Id.* To determine whether an actual controversy exists, a court must look at whether the facts alleged show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant relief. *Rock Energy*, 614 F.3d at 748.

1. Ripeness

Defendants argue that Count II is not ripe because there are several contingencies that must occur, that are not certain to occur, before the individual providers in the Disabilities Program would be subject to a fair share arrangement. The Complaint alleges that the majority of individual providers in the Disabilities Program elected not to designate any union as their exclusive representative in October 2009. (Dkt. No. 1 ¶¶ 32, 36.) Plaintiffs have not alleged that another election has been scheduled or that either Defendant SEIU Local 73 or Defendant AFSCME has petitioned to hold such an election. Further, as the Defendants asserted, the Disabilities providers could once again choose not to be represented by a labor organization. Even allowing for an election designating some union as the exclusive representative, a collective bargaining agreement that included a fair share fee provision would then need to be negotiated. Furthermore, Defendants SEIU Local 73 and AFSCME may choose not to participate in an election if one were to be held. Notwithstanding Plaintiffs' argument that an election is likely, there are simply too many "future events that may not occur as anticipated, or indeed may not occur at all" to find that the threatened alleged violation is imminent, and thus ripe for adjudication. *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir.2008). Count II is dismissed because the claim is not ripe.

2. Standing

Defendants argue that no plaintiff has standing to assert Count II for the same reason that the claim is not ripe. Plaintiffs counter that they have standing because they can show a "reasonable probability" of suffering tangible harm and that they have expended

time and money to prevent "Defendants' attempts to impose a compulsory representative upon them in violation of their constitutional rights." (Dkt. No. 33. p. 42.)

The required elements of Article III standing are: (1) an injury-in-fact, which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical; (2) a causal relation between the injury and the challenged conduct, such that the injury can be fairly traced to the challenged action of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision. *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 489 (7th Cir.2004).

To satisfy the injury-in-fact requirement, the Disabilities Plaintiffs must establish that they have sustained or are immediately in danger of sustaining some direct injury. *Id.; Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir.2001). This the Plaintiffs cannot do. Plaintiffs have couched their claim as involving an injury that the Defendants are "threatening." (Dkt. No. 1 p. 16.) Thus, the alleged injury is not actual and, as discussed above, it is not imminent given the multiple contingencies that may or may not occur. The fact that the Disabilities Plaintiffs voluntarily spent money to prevent what they perceive as a threatened violation of their First Amendment rights does not establish an injury-in-fact. *See, e.g. Forbes v. Wells Fargo Bank, N.A.*, 420 F.Supp.2d 1018, 1021 (D.Minn.2006) (granting summary judgment where plaintiffs' "expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized."). Having failed to establish an

injury-in-fact, Plaintiffs cannot meet the remaining requirements necessary to establish standing.

The Court lacks subject matter jurisdiction over Count II because the claim is not ripe and Plaintiffs lack standing. As a result, the Court dismisses Count II against all Defendants with prejudice.[4]

C. Claims for Damages Against Governor Quinn

Defendants also move for dismissal of all claims against Defendant Governor Quinn that seek monetary relief on the ground that the Eleventh Amendment bars such claims. (Dkt. No. 31 p. 38.) Plaintiffs did not address this argument in their Opposition Motion. Since the Court has concluded that Counts I and II must be dismissed with prejudice, the Court need not reach the issue of sovereign immunity.

IV. CONCLUSION

For the above stated reasons, this Court GRANTS Defendants' Consolidated Motion to Dismiss.

IT IS SO ORDERED.

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[4] To the extent that Defendants argue that Count II should be dismissed against SEIU Local 73 and AFSCME for lack of state action, the Court's ruling dismissing all Defendants from Count II renders this argument moot.

APPENDIX C

Illinois Public Act 93-204 (2003)
Ill. Legis. Serv. P.A. 93-204 (2003)

[*Relevant Provisions Only*]

Illinois Public Labor Relations Act—Personal Care Attendants or Personal Assistants—Representation; Employee Status; Collective Bargaining

AN ACT concerning disabled persons.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Illinois Public Labor Relations Act is amended by changing Sections 3 and 7 as follows:

(5 ILCS 315/3) (from Ch. 48, par. 1603)

Sec. 3. Definitions. As used in this Act, unless the context otherwise requires:

* * *

(f) "Exclusive representative", except with respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers, and peace officers in the Department of State Police, means the labor organization that has been (i) designated by the Board as the representative of a majority of public employees in an appropriate bargaining unit in accordance with the procedures contained in this Act, (ii) historically recognized by the State of Illinois or any political subdivision of the State before July 1, 1984 (the effective date of this Act) as the exclusive representative of the employees in an appropriate bargaining unit, or (iii) after July 1, 1984 (the effective date of this Act) recognized by an employer upon evidence, acceptable to the Board, that the labor

organization has been designated as the exclusive representative by a majority of the employees in an appropriate bargaining unit; *or (iv) recognized as the exclusive representative of personal care attendants or personal assistants under Executive Order 2003B8 prior to the effective date of this amendatory Act of the 93rd General Assembly, and the organization shall be considered to be the exclusive representative of the personal care attendants or personal assistants as defined in this Section.*

* * *

(n) "Public employee" or "employee", for the purposes of this Act, means any individual employed by a public employer, including interns and residents at public hospitals *and, as of the effective date of this amendatory Act of the 93rd General Assembly, but not before, personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, subject to the limitations set forth in this Act and in the Disabled Persons Rehabilitation Act*, but excluding all of the following: employees of the General Assembly of the State of Illinois; elected officials; executive heads of a department; members of boards or commissions; employees of any agency, board or commission created by this Act; employees appointed to State positions of a temporary or emergency nature; all employees of school districts and higher education institutions except firefighters and peace officers employed by a state university; managerial employees; short term employees; confidential employees; independent contractors; and supervisors except as provided in this Act.

Personal care attendants and personal assistants shall not be considered public employees for

any purposes not specifically provided for in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal care attendants and personal assistants shall not be covered by the State Employees Group Insurance Act of 19716 (5 ILCS 375/).

* * *

(o) "Public employer" or "employer" means the State of Illinois; any political subdivision of the State, unit of local government or school district; authorities including departments, divisions, bureaus, boards, commissions, or other agencies of the foregoing entities; and any person acting within the scope of his or her authority, express or implied, on behalf of those entities in dealing with its employees. *As of the effective date of this amendatory Act of the 93rd General Assembly, but not before, the State of Illinois shall be considered the employer of the personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, subject to the limitations set forth in this Act and in the Disabled Persons Rehabilitation Act. The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided for in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal care attendants and personal assistants shall not be covered by the State Employees Group Insurance Act of 19717 (5 ILCS 375/).*

* * *

(5 ILCS 315/7) (from Ch. 48, par. 1607)

Sec. 7. Duty to bargain. A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.

* * *

Collective bargaining for personal care attendants and personal assistants under the Home Services Program shall be limited to the terms and conditions of employment under the State's control, as defined in this amendatory Act of the 93rd General Assembly.

* * *

Section 10. The Disabled Persons Rehabilitation Act is amended by changing Section 3 as follows:

(20 ILCS 2405/3) (from Ch. 23, par. 3434).

§ 3. Powers and duties. The Department shall have the powers and duties enumerated herein:

* * *

(f) To establish a program of services to prevent unnecessary institutionalization of persons with Alzheimer's disease and related disorders or persons in need of long term care who are established as blind or disabled as defined by the Social Security Act, thereby enabling them to remain in their own homes or other living arrangements.

* * *

Solely for the purposes of coverage under the Illinois Public Labor Relations Act1 (5 ILCS 315/), personal care attendants and personal assistants providing services under the Department's Home Services Program shall be considered to be public

employees and the State of Illinois shall be considered to be their employer as of the effective date of this amendatory Act of the 93rd General Assembly, but not before. The State shall engage in collective bargaining with an exclusive representative of personal care attendants and personal assistants working under the Home Services Program concerning their terms and conditions of employment that are within the State's control. Nothing in this paragraph shall be understood to limit the right of the persons receiving services defined in this Section to hire and fire personal care attendants and personal assistants or supervise them within the limitations set by the Home Services Program. The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal care attendants and personal assistants shall not be covered by the State Employees Group Insurance Act of 19712 (5 ILCS 375/).

* * *

Approved: July 16, 2003
Effective: July 16, 2003

APPENDIX D

EXECUTIVE ORDER NUMBER 8 (2003)

EXECUTIVE ORDER ON COLLECTIVE BARGAINING BY PERSONAL CARE ASSISTANTS

WHEREAS, personal care assistants ("personal assistants") provide service to Illinois citizens in need ("recipients") as part of the Home Services Program under 20 ILCS 2405/3 and 89 Ill.Admin.Code section 676.10, et seq.; and

WHEREAS, in *State of Illinois (Departments of Central Management Services & Rehabilitation Services)*, 2 PERI 2006 at 35 (1985), the State Labor Relations Board found that personal assistants are in a "unique" employment relationship and that the State was not "their 'employer' or, at least, their sole employer" under the Illinois Public Labor Relations Act, 5 ILCS 315/1 *et seq.*, and the Board therefore held that it lacked jurisdiction over the relationship between the State and the personal assistants; and

WHEREAS, the decision in *State of Illinois* left the Executive Branch with discretion over the organization of its relationship with personal assistants; and

WHEREAS, it is important to preserve the recipients' control over the hiring, in home supervision, and termination of personal assistants and, simultaneously, preserve the State's ability to ensure efficient and effective delivery of personal care services and control the economic terms of the personal assistants' employment under the Homes Services Program; and

WHEREAS, each recipient employs only one or two personal assistants and does not control the economic terms of their employment under the Homes Services Program and therefore cannot effectively address concerns common to all personal assistants; and

WHEREAS, the personal assistants work in the homes of recipients throughout Illinois and therefore cannot effectively voice their concerns about the organization of the Home Services program, their role in the program, or the terms and conditions of their employment under the Program without representation; and

WHEREAS, it is essential for the State to receive feedback from the personal assistants in order to effectively and efficiently deliver home services; and

WHEREAS, personal assistants are not State employees for purposes of eligibility to receive statutorily mandated benefits because the State does not hire, supervise or terminate the personal assistants; and

WHEREAS, the State has productively dealt with a representative of the personal assistants on an informal basis, and a system of collective bargaining has successfully been implemented with respect to similarly situated workers in other states.

THEREFORE, I hereby order the following:

1. The State shall recognize a representative designated by a majority of the personal assistants as the exclusive representative of all personal assistants, accord said representative all the rights and duties granted such representatives by the Illinois Public

Labor Relations Act, 5 ILCS 315/1 et seq., and engage in collective bargaining with said representative concerning all terms and conditions of employment of personal assistants working under the Homes Services Program that are within the State's control.

2. This Executive Order is not intended to and will not in any way alter the "unique" employment arrangement of personal assistants and recipients, nor will it in any way diminish the recipients' control over the hiring, in home supervision, and termination of personal assistants within the limits established by the Home Services Program.

This Executive Order 2003 8 shall take effect upon filing with the Secretary of State.

Rod R. Blagojevich, Governor

Issued by Governor: March 4, 2003

APPENDIX E

EXECUTIVE ORDER NUMBER 15 (2009)

COLLECTIVE BARGAINING BY INDIVIDUAL PROVIDERS OF HOME BASED SUPPORT SERVICES

WHEREAS, individual providers of home based support services ("individual providers") provide services to persons with disabilities ("consumers") in their own homes as part of the Home Based Support Services Program under 405 ILCS 80/2 1 et seq., and 59 Ill.Admin.Code part 117; and

WHEREAS, individual providers are employees of the consumers whom they serve or the consumer's parents or guardian, but are not employees of the State or any other person or entity; and

WHEREAS, it is important to preserve the relationship between consumers' control over the hiring, in home supervision, and termination of individual providers and, simultaneously, preserve the State's ability to ensure efficient and effective delivery of services and control the economic terms of compensation provided under the Home Based Support Services Program; and

WHEREAS, each consumer employs only one or two individual providers and does not control the economic terms of their employment under the Home Based Support Services Program and therefore cannot effectively address concerns commons to all individual providers; and

WHEREAS, the individual providers work in the homes of consumers throughout Illinois and therefore cannot effectively voice their concerns about the organization of the Home Based Support Services Program, their role in the Program, or the terms and conditions of their provision of services under the Program without representation; and

WHEREAS, it is essential for the State to receive feedback from the individual providers in order to effectively and efficiently deliver home based support services; and

WHEREAS, individual providers are not State employees, and are not eligible to receive statutory benefits, including but not limited to those provided under Illinois Pension Code, State Employee Group Insurance Act and Illinois Workers' Compensation Act, as the State does not hire, supervise, or terminate individual providers; and

WHEREAS, the State has productively dealt for many years with a representative of personal assistants in the Home Services Program, who are similarly situated as individual providers as they provide services to vulnerable persons in their homes, are employees of those consumers, but the State controls the economic terms of their provision of services.

THEREFORE, I hereby order the following:

1. The State shall recognize a representative designated by a majority of the individual providers in the Home Based Support Services Program as the exclusive representative of all such individual providers; accord said representative all the rights

and duties granted to such representatives by the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq.; and engage in collective bargaining with said representative concerning all terms and conditions of the provision of services under the Home Based Support Services Program that are within the State's control, including the setting of minimum rates of payment to individual providers.

2. A representative may be designated either by submission of authorization cards from a majority of individual providers or by a majority of individual providers voting in a mail ballot election. Any organization that can show that at least 30% of individual providers wish to be represented by it may participate in any election held under this order. In order to facilitate this process, the Department of Human Services shall provide to an organization interested in representing individual providers access to the names and addresses of current individual providers. The expenses of all proceedings should be borne by any participating organization(s).

3. This Executive Order is not intended to and will not in any way alter 1) the fact that individual providers are not state employees, 2) the employment arrangement of individual providers and consumers, or 3) the consumers' control over the hiring, in home supervision, and termination of individual providers within the limits established by the Home Based Support Services Program.

4. In according individual providers and their selected representative these rights, the State intends that the "State action exemption" to application of the federal antitrust laws be fully available to the State, individual providers, and their selected

representative to the extent that their activities are authorized pursuant to this Executive Order.

This Executive Order 2009 15 shall take effect upon filing with the Secretary of State.

Pat Quinn GOVERNOR

Issued by Governor: June 29, 2009
Filed with Secretary of State: June 26, 2009

OPPOSITION BRIEF

No. 11-681

In the Supreme Court of the United States

PAMELA HARRIS, *et al.*,

PETITIONERS,

v.

PAT QUINN, in his official capacity as Governor of the State of Illinois, *et al.*,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT PAT QUINN

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's established First Amendment precedent to the particulars of Illinois' regulatory scheme to hold that personal assistants providing home-based care to Medicaid recipients are public employees and thus may be required to pay for their fair share of union representation.

2. Whether the court of appeals correctly held that other personal assistants do not have a ripe First Amendment claim because they are not represented by a union and do not, and may never, pay any fair share fees.

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BRIEF IN OPPOSITION

The certiorari petition should be denied. Much of the petition retreads established First Amendment principles, but petitioners do not dispute or ask the Court to revisit its holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that public employees may be required, consistent with the First Amendment, "to support legitimate, non-ideological, union activities germane to collective bargaining." Pet. App. 9a. Rather, the crux of petitioners' dispute is with the Seventh Circuit's determination that Illinois law so thoroughly regulates in-home personal assistants that these workers are legally indistinguishable from the employees in *Abood*. In the end, the first question presented is nothing more than an effort to have this Court reexamine the particulars of the many Illinois statutes and regulations governing these workers and to reevaluate whether these laws create an employment relationship that is sufficiently close to the one in *Abood*. This question implicates no split in authority. At best, it asks the Court to apply established legal principles to the specifics of this case, which—contrary to petitioners' claims—are unique to Illinois' comprehensive regulatory authority over in-home assistants.

Nor is there any reason for this Court to review the Seventh Circuit's decision on ripeness. Petitioners allege a narrow split between that decision and one other, but the Seventh Circuit properly distinguished that very case in its opinion. Accordingly, the petition should be denied on the second question presented as well.

STATEMENT

1. Medicaid is a government program designed to provide access to medical care for those unable to afford it. 42 U.S.C. § 1396-1. It is administered by each State consistent with federal limitations and criteria. 42 U.S.C. §§ 1396a–1396c. Some Medicaid-eligible individuals require continual or long-term care. 305 ILCS 5/5-1 (2010). Medicaid generally will pay the cost of caring for these individuals in institutions where their medical needs can be met. 305 ILCS 5/5-5.5 (2010). However, the federal government also allows States to provide "home or community-based [medical] services" in lieu of institutionalization, but only if the costs of these services do not exceed the costs that would have been incurred if services were provided in the traditional manner. 42 U.S.C. § 1396n(c)(1), (c)(2)(D).

2. The Illinois General Assembly created the Home Services Program ("Program") to provide medical services in a home-based setting "as a reasonable, lower-cost alternative" to institutionalization. 305 ILCS 5/5-5a (2010). The Program "enabl[es] [Medicaid-eligible individuals] to remain in their own homes or other living arrangements," thus "prevent[ing] unnecessary institutionalization." 20 ILCS 2405/3(f) (2010). The Program provides a spectrum of health care and maintenance services, ranging from "chore and housekeeping services" to "home nursing services," depending on the needs of the individual. *Ibid.* To ensure that the Program saves money, the Illinois Department of Human Services ("Department") calculates for each eligible individual "the maximum amount that may be expended for services through the

[Program] for an individual who chooses [home-care] services over institutionalization." 89 Ill. Admin. Code § 679.50(a).

3. Those who receive services under the Program are called "customers." 89 Ill. Admin. Code § 676.30(b). A Department counselor develops and provides each customer with a Service Plan, which both sign before it is submitted to the customer's physician for approval. 89 Ill. Admin. Code §§ 676.30(c), 684.10(a), (c). The Service Plan lists "all services to be provided to [the] individual through [the Home Services Program]," including "the type of service(s) to be provided to the customer, the specific tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, [and] the rate of payment for the services." 89 Ill. Admin. Code §§ 676.30(u), 684.10(a), 684.50. The State will pay only for the types and number of services permitted by the Service Plan. 89 Ill. Admin. Code §§ 676.200, 684.10.

4. "Personal assistants" perform many of the services contained in the State-created Service Plan, including "household tasks, shopping or personal care," "monitoring to ensure health and safety of the customer," and other "incidental health care tasks." 89 Ill. Admin. Code § 686.20. To be eligible to work as a personal assistant, a person must satisfy criteria imposed by the Department, including age and work hour limits, pre-hire recommendations from former employers, and documented comparable experience. 89 Ill. Admin. Code §§ 677.40(d), 686.10(b)-(d), (h)(2). In addition, the Department counselor assigned to the customer must evaluate the applicant's communication skills and ability to follow directions before any

personal assistant is hired. 89 Ill. Admin. Code § 686.10(d)-(e). State law also bars certain persons related to the customer from working as that customer's personal assistant. 89 Ill. Admin. Code § 684.30. Once a personal assistant is approved for hiring, both the customer and the personal assistant then must sign a Department-drafted agreement detailing the personal assistant's job responsibilities. 89 Ill. Admin. Code § 686.10(h).

The State pays the personal assistants' wages and benefits directly, and the State withholds federal social security taxes and state and federal income taxes. 89 Ill. Admin. Code §§ 686.10(h)(10), 686.40(a)-(b). Customers neither pay their personal assistants, nor may they vary the wage rate established by the State. 89 Ill. Admin. Code § 676.200; 42 C.F.R. 447.15.

5. In 2003, the Illinois General Assembly passed Public Act 93-204 (the "Act"), which amended the Disabled Persons Rehabilitation Act, 20 ILCS 2405/3(f) (2010), to permit personal assistants to form a union. The Act allowed the personal assistants to select an exclusive representative to negotiate with the State over the many terms and conditions of employment within the State's control. 5 ILCS 315/3(f)(iv), 315/7 (2010). The Act provides that "[s]olely for the purpose of coverage under the Illinois Public Labor Relations Act, personal care attendants and personal assistants providing services under the Department's Home Services Program shall be considered public employees and the State of Illinois shall be considered to be their employer." 20 ILCS 2405/3(f) (2010).

In July 2003, the personal assistants in the Program unionized, choosing the Service Employees

International Union Healthcare Illinois & Indiana ("SEIU-HII") as their collective bargaining representative. D.Ct. Dkt. 1 ¶¶ 20-22. The State entered into a collective bargaining agreement with SEIU-HII in August 2003, D.Ct. Dkt. 32-5, and a renewed agreement in 2008. D.Ct. Dkt. 32-4. The agreement covers wages, health benefits, workplace safety, grievance procedures, subcontracting, and the respective rights of management (namely, the Department), the union, and the customers. *Ibid.* It requires the State to deduct union dues and membership fees from the wages of union members, and to deduct from the wages of non-members "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." D.Ct. Dkt. 32-4 art. X § 5-6. Illinois law authorizes the State to collect these "fair share" fees and remit them to the union. 5 ILCS 315/6(a) (2010).

6. Petitioners, who include personal assistants in the Program, sued the union and Illinois Governor Pat Quinn under 42 U.S.C. § 1983, alleging that the deduction of fair share fees from their paychecks violated the First Amendment. D.Ct. Dkt. 1 ¶ 46. The district court dismissed the complaint because the fair share fees did not "impose[ ] any burden on [petitioners] beyond supporting the collective bargaining arrangement from which they benefit." Pet. App. 35a. Petitioners did not allege that the "fair share fees * * * are used to support any political or ideological activities." *Ibid.* Nor did they assert that they were "forced to support any * * * viewpoint with which they disagree." Pet. App. 34a. The district court

thus concluded that the fair share fees are "constitutional under * * * longstanding Supreme Court precedent," which holds that the mere payment of money to a union to cover an employee's "proportionate share of the costs of the collective bargaining process" does not violate the First Amendment. Pet. App. 35a.

7. The Seventh Circuit affirmed in a unanimous opinion. Pet. App. 1a-17a. To begin, the court "set out the controlling precedent"—*Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and *Abood* —which hold that, "as a general matter, employees may be compelled [through compulsory fair share fees] to support legitimate, non-ideological, union activities germane to collective bargaining representation." Pet. App. 7a, 9a. The Seventh Circuit next "consider[ed] whether the personal assistants are, as the defendants contend, State employees" because, "[i]f so, this case is controlled by *Abood* and the plaintiffs' claims fail." Pet. App. 9a. To determine whether the State is the personal assistants' employer, the court looked to the degree to which the State "exercise[s] control over the" personal assistants. Pet. App. 10a.

Based on its review of Illinois' regulations governing the Program, the Court concluded that "the State does have significant control over virtually every aspect of a personal assistant's job." *Ibid.* Specifically, the court found that:

> While [Illinois'] home-care regulations leave the actual hiring selection up to the home-care patient, the State sets the qualifications and evaluates the patient's choice. And while only the patient may

> technically be able to fire a personal assistant, the State may effectively do so by refusing payment for services provided by personal assistants who do not meet the State's standards. When it comes to controlling the day-to-day work of a personal assistant, the State exercises its control by approving a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions and annually reviews each personal assistant's performance. Finally, the State controls all of the economic aspects of employment: it sets salaries and work hours, pays for training, and pays all wages—twice a month, directly to the personal assistants after withholding federal and state taxes.

Pet. App. 10a-11a (citations to Illinois Administrative Code omitted). "In light of this extensive control," the court had "no difficulty concluding that the State employs personal assistants within the meaning of *Abood*." Pet. App. 11a. Because the State was the personal assistants' employer, "the interests identified by the Court in *Abood* are identical to those advanced by the State in this case." Pet. App. 13a. *Abood* thus required dismissal of petitioners' claim. *Ibid.*

The Seventh Circuit "stress[ed] the narrowness of [its] decision," which turned on the court's finding that personal assistants qualify as state employees "for purposes of applying *Abood*" because of the significant control Illinois exercises over their employment. *Ibid.* Given this finding, the Seventh Circuit had "no reason to consider whether the State's interests in labor relations justify mandatory fees outside the

employment context," including "whether *Abood* would still control if the personal assistants were properly labeled independent contractors" and "whether and how a state might force union representation for other health care providers who are not state employees." *Ibid.*

8. Illinois also hires personal assistants to care for disabled adults under the Home-Based Support Services Program ("Support Services Program"), which is administered by the Department's Division of Developmental Disabilities. 405 ILCS 80/2-1 *et seq.* (2010); see also 59 Ill. Admin. Code §§117.100–117.240. In 2009, Governor Quinn issued an executive order authorizing the State to bargain with a collective bargaining representative chosen by a majority of the personal assistants in the Support Services Program. D.Ct. Dkt. 32-3. In October 2009, the Illinois State Labor Relations Board supervised a mail-ballot election in which the personal assistants voted against union representation. D.Ct. Dkt. 1 ¶¶ 18, 32. Thus, personal assistants in the Support Services Program are not represented by a union nor covered by a collective bargaining agreement.

Petitioners' complaint alleged that these personal assistants' First Amendment rights were violated because the State had threatened to enter into an agreement that might require them to pay fair share fees. D.Ct. Dkt. 1 ¶¶ 48-49. Because the Support Services Program petitioners have never paid fair share fees, however, the district court held that they had not suffered an injury sufficient to confer standing. Pet. App. 38a-39a. The Seventh Circuit agreed and affirmed, noting that these petitioners had alleged no specific injury, but merely that the existence of the

executive order committing the State to bargain with a majority representative (if one were ever elected) increased the likelihood that they would suffer a future violation of their rights. Pet. App. 15a. The court held that this claim was not ripe for adjudication because "courts cannot judge a hypothetical future violation * * * any more than they can judge the validity of a not-yet-enacted law." Pet. App. 16a.

REASONS FOR DENYING THE PETITION

I. The First Question Presented Seeks Mere Error Correction On An Issue Arising Under Illinois Law And Is Otherwise Unworthy Of Certiorari Review.

Abood rejected a First Amendment challenge to a "fair-share" provision in a collective bargaining agreement between a public employer and a union requiring non-member employees to pay a fee to the union to cover the "benefits of union representation that necessarily accrue to all employees." 431 U.S. at 222. The Court reasoned that a public employer has an "important" interest in achieving "labor peace" and that the "designation of a single representative" on workplace matters furthers this interest. *Id.* at 220-221, 224. But free riders—employees who "refuse to contribute to the union while obtaining benefits of union representation"—undermine the authority and power of the exclusive representative, thereby interfering with the government's effort to establish stable and peaceful labor relations. *Id.* at 220-222. Thus, "*Abood* determined that * * * compulsory affiliation with, or monetary support of, a public-employment union does not, without more, violate the First Amendment rights of public

employees." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 517 (1992); see also *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001) (under *Abood*, "[t]o attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association").

Petitioners do not challenge *Abood*'s First Amendment holding or ask this Court to reconsider it. Rather, they contend that the Seventh Circuit misapplied that holding to the facts of this case, and that—although the decision below implicates no split in authority—it announces a broad rule with nationwide implications. But petitioners make these claims only by mischaracterizing the Seventh Circuit's holding and ignoring portions of the Illinois law on which it relied. In fact, the holding below is a narrow one that turns on facts specific to Illinois' regulatory regime. Petitioners' request for error correction in the application of *Abood* to the particulars of this regime is not worthy of certiorari review. Nor was there error here in any event, for the Seventh Circuit faithfully applied this Court's precedent.

A. The Decision Below Is Limited To Illinois' Regulatory Regime For Personal Assistants Working In The Program.

Petitioners proceed from the premise that the decision below gives "dispositive" weight to the fact that "the State controls how much [the personal assistants] are paid," Pet. 20; see also *id.* at 11 (arguing that Seventh Circuit has stretched *Abood* rule, "previously applicable only to actual government

employees, * * * to individuals whose services are merely subsidized by a government program"); *id.* at 21 ("whose services are merely paid for by the government"); *id.* at 23-24 (characterizing Seventh Circuit's holding as "expansive" because court purportedly held that "a state is a joint employer if it pays for the provision of defined services"). But this misrepresents the Seventh Circuit's opinion, which explained that the personal assistants are state employees only because Illinois exerts "significant control over virtually every aspect of [their] job"—not merely because the State pays them. Pet. App. 10a; see also *id.* at 11a ("In light of this extensive control, we have no difficulty concluding that the State employs personal assistants within the meaning of *Abood*.").

Indeed, as explained above, see *supra* pp. 6-7, the Seventh Circuit reached this conclusion after considering the many ways in which the State controls the workplace for personal assistants in the Program. "[T]he State sets the qualifications and evaluates the patient's choice" in hiring assistants and may "effectively" fire those who fall short of State-set standards, and the State also "approv[es] a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions," "annually reviews each personal assistant's performance," and "controls all of the economic aspects of employment." Pet. App. 10a-11a. The Seventh Circuit went out of its way to limit its holding to this combination of Illinois-law factors. The court emphasized "the narrowness of [its] decision" and thus specifically declined to address issues such as "whether the States' interests in labor relations justify mandatory fees outside the employment context," "whether *Abood* would still

control if the personal assistants were properly labeled independent contractors," and "whether and how a state might force union representation for other health care providers who are not state employees." Pet. App. 13a.

Accordingly, there is nothing to petitioners' claim that the decision below opens the door for States to impose "compulsory advocates" on "medicaid providers and other recipients of government monies" (purportedly including doctors, nurses, hospitals, nursing homes, and foster care providers), Pet. 21-22, for the Seventh Circuit expressly disclaimed this broad reading.

Nor is there anything to the claim that the Seventh Circuit announced a rule affecting workers in other States who provide home care to beneficiaries of government aid programs. See Pet. 22-23. Petitioners identify only eight States (other than Illinois) that have permitted workers who provide home care to Medicaid recipients to organize. See Pet. 22 & nn. 10-11 (of twelve States that at one point authorized collectivization, three have rescinded authorization). And one of those eight (Connecticut) does not allow for the collection of fair share fees. Conn. Exec. Order 10 § 10.

Each of the remaining States has its own unique statutes and regulations governing home care programs, precluding ready application of the Seventh Circuit's holding to those regimes. Missouri, for example, permits collective bargaining by "personal care attendants," Mo. Rev. Stat. § 208.862(3), but the structure of the employment relationship is materially different from Illinois'. In Missouri, the personal care

attendants are employed by third-party "vendors" that enter into contracts with both the State and the consumer. 19 Mo. Code Regs. § 15-8.100(1)(S) (vendor provides "monitoring and oversight of the attendant" pursuant to "written agreement with" state agency); 19 Mo. Code Regs. § 15-8.400 (explaining responsibilities of private vendor to train, pay, supervise, and monitor personal care attendants). Contrary to petitioners' suggestion, the Seventh Circuit's finding of a public employment relationship under Illinois law could hardly be extended to States, like Missouri, with vastly different laws.

In short, petitioners seek mere error correction, on a question that implicates no split in authority and that turns on a particular combination of Illinois statutes and regulations. Accordingly, as the Seventh Circuit's opinion makes clear, any resolution of the first question presented would have little effect beyond the specific facts of this case, and for this reason alone the question does not warrant certiorari review.

B. The Seventh Circuit Did Not Err In Any Event, And Petitioners' Claim That The Seventh Circuit's Decision Conflicts With *Abood* Or Other Decisions Of This Court Is Misplaced.

That petitioners ask this Court to engage in error correction on a narrow ruling specific to Illinois' regulatory regime is reason enough to deny certiorari review on the first question presented. But petitioners are wrong to claim that the Seventh Circuit misapplied *Abood* to the facts of this case, nor does the decision below conflict with this Court's precedent.

There are no personal assistants providing services under the Program except to the extent allowed by the Illinois General Assembly. See 20 ILCS 2405/3(f) (2010) (authorizing creation of "program of services to prevent unnecessary institutionalization of * * * persons in need of long term care * * * thereby enabling them to remain in their own homes"). Having created both the program and the job, Illinois chose to promulgate extensive regulations governing the job qualifications, job duties, hours of work, and wages of the personal assistants who carry out this government program. See *supra* pp. 2-4. These regulations do, as the Seventh Circuit found, give the State "significant control over virtually every aspect of the personal assistants' job." Pet. App. 10a.

And because the relationship between the personal assistants and their public employer is indistinguishable in relevant part from that between the school district and the teachers in *Abood*, the court below correctly determined that "the interests identified by the Court in *Abood* [as sufficient to

support the fair share provision] are identical to those advanced by the State in this case." Pet. App. 13a. Consequently, *Abood* foreclosed the personal assistants' First Amendment claim. See *ibid.* Petitioners' contrary arguments fall short.

1. Petitioners contend that, for First Amendment purposes, the personal assistants should be treated as "*citizens* petitioning their State as sovereign" in public forums rather than public employees negotiating with their government employer. Pet. 16 (emphasis in original). This follows from petitioners' repeated assertion that personal assistants are not managed by the State. See Pet. 16, 19, 24. But this argument assumes away the Seventh Circuit's conclusion that personal assistants are state employees. See Pet. App. 13a. Because the Seventh Circuit did conclude that personal assistants are public employees, their unionization and subsequent negotiation was not, as petitioners claim, for the purpose of "petitioning the State over its Medicaid policies." Pet. 26. Rather, it was for the purpose of negotiating an agreement governing those terms and conditions of their employment that the State controlled. Indeed, the current contract between the State and the union shows that personal assistants secured a 20% increase in pay, $37,000,000 for health benefits, and $18,000,000 for wages and other benefits following their decision to unionize. Doc. 32-3 (collective bargaining agreement). As citizens, petitioners remain free to speak and petition government with their views on Illinois' Medicaid policies; as *Abood* recognized,

however, fair share fees from state employees may be used for matters pertaining to collective bargaining.*

2. Petitioners do not quarrel with this rule from *Abood*, but they seek to distinguish that case on its facts. Petitioners contend that the state interest *Abood* recognized in maintaining a peaceful and harmonious employment relationship does not apply here because personal assistants work "in the private homes of persons with disabilities" and thus cannot "disrupt the harmony of a government workplace." Pet. 15-19. Petitioners' argument—without support in the decisions of this or any lower court—rests on two premises, neither of which withstands scrutiny.

Petitioner's first premise—that the State's labor peace interest depends on whether its employees work in government-owned buildings or on private property—fails for the simple reason that the government interest in facilitating a stable employer-employee relationship does not change merely because its employees' location does. The State has an interest in avoiding disruptions to its social service programs and maintaining a well-trained and reliable workforce regardless of whether the personal assistants work at a single, government-owned site or are dispersed throughout the State. Indeed, petitioners' argument proves far too much, for, it would eliminate collective bargaining agreements for a wide variety of public employees who regularly work outside

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* *Abood* and *Lehnert* held that a union may not use fair share fees to support causes unrelated to collective bargaining, see *Abood*, 431 U.S. at 235; *Lehnert*, 500 U.S. at 519, but petitioners have not alleged that the fair share fees at issue here were so used, see Pet. App. 7a.

a centralized government workplace, including bus drivers, police officers, and sanitation workers.

Petitioners' second premise—that the government interest identified in *Abood* is limited to "avoiding workplace disruptions caused by employee attempts to petition their employer through multiple organizations," Pet. 12—is equally flawed. The Seventh Circuit correctly declined to "accept [this] narrow characterization of the labor peace interest." Pet. App. 12a. The court noted this Court's pre-*Abood* holding that "'[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex' and a question of policy outside of the judiciary's concern." *Ibid.* (quoting *Hanson*, 351 U.S. at 234). Relying on *Hanson*, the court reasoned that *Abood* used the shorthand "labor peace" "to include 'stabilized labor management relations,' which are at issue in any employer-employee relationship." *Ibid.*

Indeed, the State's interest in ensuring stable labor relations is particularly acute here because the Illinois General Assembly established the Home Services Program to provide critical services to the State's most vulnerable citizens in a cost-effective manner. See *supra* p. 2. The personal assistants, who interact directly with program beneficiaries, are crucial to its success. Consequently, high turnover, low morale, excessive absenteeism, poor training, lack of productivity, or any combination thereof among personal assistants would make it difficult for the State to maintain people in their homes, undercutting the social and financial benefits of the Program. Thus, the State has a legitimate interest in coordinating and cooperating with the personal assistants to further the Program's goals. And it was reasonable for the Illinois

General Assembly to conclude that this interest would be well served through collective bargaining. This Court consistently has "accorded great weight to the [legislative] judgment" regarding when collective bargaining is appropriate. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 n.8 (1986); see also *Abood*, 431 U.S. at 229 (deferring to Michigan legislature's conclusion "that labor stability will be served by a system of exclusive representation and permissible use of an agency shop in public employment."

3. In the alternative, Petitioners, relying on *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), argue that the personal assistants' employment status is constitutionally irrelevant. See Pet. 19-21. At the threshold, petitioners misstate the Seventh Circuit opinion, which relied, not on the label given to the personal assistants or the fact that the State pays their salaries, but on the fact that the State functions as the personal assistants' employer by exercising authority over every aspect of their jobs.

In any event, Petitioners are wrong to suggest that *O'Hare* supports their view that the personal assistants' status as state employees is immaterial. In *O'Hare*, this Court permitted a government contractor's claim that a municipality and its mayor violated the First Amendment by depriving the contractor of city business in retaliation for the contractor's having supported the mayor's political rival. See 518 U.S. at 715-716, 725-726. To reach this holding, the Court extended *Elrod v. Burns*, 427 U.S. 347 (1976), and *Perry v. Sindermann*, 408 U.S. 593 (1972), which bar a government employer from retaliating against public employees who express disfavored political views, to

hold that the government may not condition other forms of state largesse on the recipient's agreement to "express[ ]. or not express[ ]. specific political views." 518 U.S. at 725-726.

But *Abood* specifically rejected the argument that "fair-share" provisions are "governed by * * * decisions" (including *Elrod* and *Perry*) "holding that public employment cannot be conditioned upon the surrender of First Amendment rights." 431 U.S. at 226. This Court recognized the meaningful difference between requiring employees to contribute to the costs of collective bargaining and requiring them to espouse or suppress particular views. See *id.* at 229-230. And the Court held that because "[a] public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint," *id.* at 230. compulsory contribution cases do not present the same First Amendment issues as *Elrod* and *Perry*. These cases (like *O'Hare*. but unlike *Abood*) involve "the direct and specific abridgment of First Amendment rights." *O'Hare*, 518 U.S. at 720.

The Seventh Circuit thus correctly distinguished *O'Hare*, explaining that "[e]mployee speech jurisprudence is entirely distinct from that of compelled association. as are the interests that justify (or not) each respective intrusion into employees' freedom of speech." Pet. App. 12a n.5.

* * *

In sum, petitioners ask this Court to engage in mere error correction on the Seventh Circuit's conclusion that personal assistants are state employees under Illinois' regulatory regime. Nor was there error in any event, for the decision below properly construed Illinois law and faithfully applied this Court's precedent.

II. The Seventh Circuit's Holding That Certain Petitioners' Claims Are Not Ripe Implicates No Conflict With Decisions Of This Court Or Lower Court Authority, And The Holding Is Correct On The Merits.

The second question presented is equally unworthy of certiorari review, for the Seventh Circuit's holding that the Support Services Program petitioners' claims are not ripe—because these personal assistants rejected union representation and thus have not paid (and may never pay) any fair share fees—implicates no split in authority and, in any event, is correct. The decision below properly held that petitioners' "hypothetical future violation" would become ripe only if and when the personal assistants "vote to unionize and enter an agreement with the State mandating fair share fees." Pet. App. 16a-17a. At the present time, however, petitioners' alleged violation is neither imminent nor even likely, as it depends on numerous "'contingent future events that may not occur as anticipated or, indeed may not occur at all.'" Pet. App. 14a (quoting *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir. 2008) (in turn quoting *Texas v. United States*, 523 U.S. 296, 300 (1998))).

The Seventh Circuit thus properly distinguished *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010) (the only case on which petitioners rely for their alleged circuit split, see Pet. 27-28) on its facts. See Pet. App. 16a. In *Mulhall*, the plaintiff sued to enjoin enforcement of an agreement between his employer and a local labor union pursuant to which the union agreed to lobby on behalf of the employer, and the employer, in return, agreed to aid the union in organizing its employees. See 618 F.3d at 1284. Because the terms of the agreement put the plaintiff's constitutional rights at "imminent risk of invasion," the Eleventh Circuit held that the plaintiff had standing to sue. 618 F.3d at 1288; see also *id.* at 1292 (deeming it "extremely unlikely" that constitutional injury to plaintiff would be avoided). Here, by contrast, the alleged First Amendment injury "may never occur," making *Mulhall* inapposite. Pet. App. 16a. Thus, certiorari should be denied on the second question as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OPPOSITION BRIEF

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No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,
Petitioners,
v.
PAT QUINN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ILLINOIS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SEIU HEALTHCARE ILLINOIS & INDIANA, SEIU LOCAL 73, AND AFSCME COUNCIL 31

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the fair-share provision in the collective bargaining agreement covering workers paid by the State of Illinois to provide in-home care to disabled adults to carry out a state program does not violate the First Amendment.

2. Whether the court of appeals correctly concluded that homecare workers who voted against union representation did not have a justiciable challenge to a hypothetical fair-share requirement.

CORPORATE DISCLOSURE

Respondents submitting this Brief in Opposition are EIU Healthcare Illinois & Indiana, SEIU Local 73, and FSCME Council 31. Respondents have no parent corpo-ıtions and no publicly held company owns any stock in ıese respondents.

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IN THE

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BRIEF IN OPPOSITION OF RESPONDENTS SEIU HEALTHCARE ILLINOIS & INDIANA, SEIU LOCAL 73, AND AFSCME COUNCIL 31

STATEMENT OF THE CASE

1. Facts

a. The State of Illinois pays personal care assistants ("providers") to deliver in-home care to disabled individuals who might otherwise face institutionalization. Approximately 20,000 providers are paid by the State to perform this work as part of the Home Services Program administered by Illinois' Division of Rehabilitation Services ("Rehabilitation Program"). *See* 20 ILCS 2405/1 et seq. & 89 Ill. Admin. Code 676.10 et seq.; Complaint (Dist. Ct. Doc. 1) ¶12. The Rehabilitation Program serves adults under 60 years of age with long-term disabilities, brain injuries, or low cognitive functions. 89 Ill. Admin. Code 682.100(d)-(g). The program is "designed to prevent

the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State." 89 Ill. Admin. Code 676.10(a).

The State pays providers to assist clients with "Activities of Daily Living," which can include bathing, dressing, and lifting the customer; cooking, cleaning, and shopping; and certain health care procedures. 89 Ill. Admin. Code 676.30. The specific services performed by each provider are determined by a Department-employed counselor and codified in a "service plan." 89 Ill. Admin. Code 684.10, 684.50. The service plan delineates "the type of service(s) to be provided to the customer, the specific tasks involved, the frequency with which the specific tasks are to be provided, [and] the number of hours each task is to be provided per month." 89 Ill. Admin. Code 684.10, 684.50. The State pays providers only to perform the tasks and to work the hours provided for in the service plan. *Id.*

The State sets the wage rate for providers and pays them directly to perform services. 89 Ill. Admin. Code 686.40(a)-(b). Clients do not receive the payments for their providers. 89 Ill. Admin. Code 676.200. Nor can clients increase or vary the wage rate set by the State. 89 Ill. Admin. Code 677.40(d); 42 C.F.R. §447.15.

Because of the intimate nature of the services, the Rehabilitation Program permits clients to choose and supervise their providers. The State, however, ultimately controls who it will pay to work as a provider and the type of services for which it will pay. Providers must comply with certain age and work-hour limitations, provide written or oral recommendations from previous employers or other unrelated adults, have previous experience in the field, agree to a Department-drafted employment agreement, and satisfy the Department-appointed counselor that they can communicate and follow direc-

tions adequately. 89 Ill. Admin. Code 686.10. Counselors employed by the State provide referrals of qualified provider candidates to clients. 89 Ill. Admin. Code 684.20.

b. In 2003, the Illinois Legislature amended the Illinois Public Labor Relations Act to include "personal assistants working under the [Rehabilitation] Program" as "[p]ublic employee[s]" of the State for purposes of collective bargaining under the Act. 5 ILCS 315/3(n)-(o). The Act permits the majority of providers to choose a representative "to bargain collectively . . . on questions of wages, hours, and other conditions of employment" with the State. 5 ILCS 315/6(a)-(c). Providers have the right to select the representative of their choice, or to reject representation altogether. 5 ILCS 315/9(d). Shortly after the Act was amended, the majority of Rehabilitation Program providers chose to be represented by SEIU Healthcare Illinois & Indiana ("SEIU HCII"). Pet. App. 22a.

The 2008-2012 collective bargaining agreement ("CBA") between SEIU HCII and the State provides for the pay rates for providers to be increased from $9.35/hour to $11.55/hour during the course of the agreement. CBA, Art. VII, Sec. 1 (Dist. Ct. Doc. 32-3). The CBA also requires the State to notify providers before reducing the number of authorized hours for which they will be paid. CBA, Art. XII, Sec. 7. The CBA commits the State to contribute $37,000,000 to a health benefits fund for providers. CBA, Art. VII, Sec. 2(a). The CBA further contains a commitment that the State will provide an additional $18,000,000 over the course of the agreement to be allocated between wages and other benefit funds. CBA, Art. VII, Sec. 2(b). The CBA establishes a joint committee through which the State and SEIU HCII will work together in developing training programs and "study health and safety issues" for providers. CBA, Art. IX. The CBA provides for the creation of a Joint Personal Assistant

Registry Committee to implement a registry system to improve procedures for referring providers to customers. CBA at 13 (side letter).

The CBA also contains various other provisions typically found in collective bargaining agreements, including a no strike/no lockout provision, a grievance/arbitration procedure to resolve any "dispute regarding the meaning or implementation of a specific provision of [the CBA]," and a "fair-share" provision. CBA, Art. XII, Sec. 5; Art. XI; Art. X, Sec. 6. The fair share provision requires "all Personal Assistants who are not members of the Union . . . to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment, but not to exceed the dues uniformly required of members." CBA, Art. X, Sec. 6.

c. Illinois pays a different group of providers to deliver home-based care to mentally disabled adults as part of the Home-Based Support Services Program administered by its Division of Developmental Disabilities ("Disabilities Program"). *See* 405 ILCS 80/2-1 et seq. & 59 Ill. Admin. Code 117.100 et seq. An Executive Order authorizes these providers to select a representative for purposes of collective bargaining or to reject representation altogether. Pet. App. 5a.

In 2009, respondent SEIU Local 73 petitioned for an election to become the representative of the approximately 4,500 Disabilities Program providers. Complaint ¶¶18, 32. Respondent AFSCME Council 31 intervened in that election as a rival candidate seeking to become the providers' representative. *Id.* A mail ballot election was held in October 2009, and the providers voted against representation by either union. *Id.* As a result, there presently is no union representation or collective-bargaining agreement or fair-share fee for Disabilities Program providers.

2. Proceedings Below

a. Petitioners are nine providers paid to care for disabled individuals enrolled in either the Rehabilitation Program or Disabilities Program. Pet. App. 20a. The Rehabilitation Program petitioners alleged that the fair-share fee provision in their collective bargaining agreement violates the First Amendment. Complaint ¶¶ 46-47. The Disabilities Program petitioners alleged that respondents were threatening to violate their First Amendment rights by entering into a collective bargaining agreement that would require them to pay fair-share fees. *Id.* ¶¶ 48-49.

b. The district court dismissed the Rehabilitation petitioners' claim on the merits. The district court started its analysis by recognizing that this "Court has held that employees can be required to contribute fair share fees to compensate unions for their representational activities." Pet. App. 28a; *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). The district court concluded that the State controlled the key employment terms for the Rehabilitation providers, paid them for their work, had "a vital interest in establishing peaceful labor relations with" them, and functioned as their employer for purposes of collective bargaining, so the CBA's fair-share provision fell squarely within this "longstanding Supreme Court precedent." Pet. App. 33a-35a. Petitioners did not allege that the fair-share fees were collected for activities other than collective bargaining representation. Pet. App. 35a ("There are no allegations that the fair share fees here are used to support any political or ideological activities.").

The district court dismissed the Disabilities petitioners' claim for lack of subject matter jurisdiction. These petitioners were not represented by a union and had not paid fair share fees, so they lacked an "injury-in-fact" sufficient to confer standing to sue. Pet. App. 38a-39a. The district court rejected petitioners' argument that they

were threatened with such injury, concluding that it depended on "too many future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 37a (citation, internal quotation marks omitted).

c. The court of appeals affirmed the dismissal of the case in a unanimous decision by Senior Judge Manion.

With respect to the Rehabilitation petitioners, the court of appeals also began its analysis with the settled law that fair-share fees are permissible in the employment context when limited to the costs of collective bargaining representation. Pet. App. 7a-9a. The court of appeals considered the operation of the Rehabilitation program and, "because of the significant control the state exercises over all aspects of the personal assistants' jobs," *id.* at 13a, the court of appeals had "no difficulty concluding that the State employs [the] personal assistants within the meaning of *Abood*," *id.* at 11a. Therefore, "the fair share fees in this case withstand First Amendment scrutiny – at least against a facial challenge to the imposition of the fees." *Id.* at 13a. The court of appeals "stress[ed] the narrowness of [its] decision" and that it had "no reason to consider" whether fair-share arrangements are permissible beyond the specific facts of Illinois' Rehabilitation Program. *Id.*

The court of appeals agreed with the district court that the Disabilities petitioners' challenge to a purely hypothetical fair-share arrangement was not justiciable. Pet. App. 14a-17a.

REASONS THE PETITION SHOULD BE DENIED

Petitioners and their amici do not accurately describe the facts of this case or the narrow legal claim presented to and addressed by courts below. As both lower courts concluded, the State of Illinois functions in all relevant respects as an employer of these home-care providers.

The first question presented therefore does not involve a novel First Amendment issue, as the Petition contends, but only an application of settled law that fair-share fees are permissible to support collective bargaining about wages, benefits and other employment terms. Nor is the second question presented, concerning justiciability, worthy of the Court's review. The Petition therefore should be denied.

1. Petitioners do not contend that there is any conflict in the lower courts as to the first question presented and, indeed, no judge has found merit in their argument.[1] Petitioners instead assert that review is justified because "[t]his case presents the extraordinary circumstance of citizens being forced to petition a state for more benefits from a public-aid program through an advocate the state itself designated." Pet. 7. Every part of this assertion is inaccurate or misleading.

First, the approximately 20,000 providers in the Rehabilitation Program are not mere "citizens" in this context, but employees whom the State is paying by the hour to deliver homecare services to disabled adults on behalf of the State pursuant to state-approved service plans and within a state medical assistance program. As a result of these services, the State avoids the much higher cost of providing nursing home care. The court of appeals explained:

> [T]he State [has] significant control over virtually every aspect of a personal assistant's job. While the home-care regulations leave the actual hiring selection up to the home-care patient, the State sets the

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[1] Petitioners' argument was rejected not only by the district judge and three court of appeals judges in this case but also by a district court judge in California in a prior case raising the same argument with regard to that state's similar program. *See* Pet. App. 34a-35a.

> qualifications and evaluates the patient's choice. And while only the patient may technically be able to fire a personal assistant, the State may effectively do so by refusing payment for services provided by personal assistants who do not meet the State's standards. When it comes to controlling the day-to-day work of a personal assistant, the State exercises its control by approving a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions and annually reviews each personal assistant's performance. Finally, the State controls all of the economic aspects of employment: it sets salaries and work hours, pays for training, and pays all wages – twice a month, directly to the personal assistants after withholding federal and state taxes. *In light of this extensive control, we have no difficulty concluding that the State employs personal assistants within the meaning of* Abood.

Pet. App. 11a (emphasis supplied).

Second, SEIU HCII is not "an advocate the state itself designated" (Pet. 7) but the labor organization that the majority of providers chose as their representative to engage in collective bargaining about their wages, health benefits and other employment terms. Pet. App. 4a-5a.

Third, the collective bargaining agreement between SEIU HCII and the State does not address the "benefits" offered by "a public-aid program" (Pet. 7), but the typical subjects of employee collective bargaining: hourly wages, health care coverage, training, safety, and a grievance/arbitration process. *See* pp. 3-4, *supra*. The governing Illinois statute authorizes collective bargaining solely "on questions of wages, hours, and other conditions of employment." 5 ILCS 315/6(a)-(c). Nothing in the providers' collective bargaining agreement deals with "changes to Illinois Medicaid programs" (Pet. 16) in the

sense of changes to the program rules about eligibility for services or which services are provided to beneficiaries.

Fourth, Rehabilitation Program providers who choose not to become members of SEIU HCII are not "forced to petition [the] state" (Pet. 7) through SEIU HCII, nor is the State "quelling [their] constitutional right . . . to make disparate demands on the State through diverse associations in public forums" (*id.* at 16). The Court's decisions already establish that the government's recognition of an "exclusive representative" for purposes of collective bargaining cannot prevent public employees from petitioning the government in opposition to that representative or otherwise exercising their affirmative First Amendment petition rights in "public forums."[2] Petitioners did not allege any interference with *those* First Amendment rights in the lower courts. Pet. App. 5a n.2 ("the constitutional claim in this appeal is confined to the payment or potential payment of the fair share requirement").

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[2] *Abood*, 431 U.S. at 230 ("[W]e recognize[] that the principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental decisions concerning labor relations."); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) ("Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace."); *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employee Relations Comm'n*, 429 U.S. 167, 176 n. 10 (1976) ("no one would question the absolute right of the nonunion teachers to . . . communicate [their] views to the public . . . [or] directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands"). The government's mere decision to recognize an exclusive bargaining representative does not violate the First Amendment because "the state [is] free to consult or not consult whomever it pleases." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984); *see also id.* at 288 ("A person's right to speak is not infringed when government simply ignores that person while listening to others.").

Because petitioners' challenge was limited to the payment of the fair-share fee for collective bargaining, moreover, this case does not implicate the line of authority that, as a general matter, protects both public employees and independent contractors against retaliation for their political affiliations or activities. *See Elrod v. Burns*, 427 U.S. 347 (1976); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996). Petitioners did not allege that they were required to become members of any labor organization, and "there [were] no allegations that the fair share fees here are used to support any political or ideological activities." Pet. App. 35a.

All that being so, the court of appeals recognized that the case presented "a narrow question: Does a collective bargaining agreement that requires Medicaid home-care personal assistants to pay a fee to a union representative violate the First Amendment, regardless of the amount of those fees or how the union uses them?" Pet. App. 1a. The court of appeals' answer to that question was equally narrow and dictated by the facts of this case: "Because the personal assistants are employees of the State of Illinois, at least in those respects relevant to collective bargaining, the union's collection and use of fair share fees is permitted by the Supreme Court's mandatory union fee jurisprudence." Pet. App. 1a-2a. The court of appeals explicitly limited its decision to the employment context, and "ha[d] no reason to consider whether the State's interests in labor relations justify mandatory fees *outside* the employment context." Pet. App. 13a (emphasis supplied).[3] This case therefore would not be a vehicle for considering that issue.

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[3] The court of appeals stated in the clearest possible language that the general legality of hypothetical fair-share arrangements for "contractors, health care providers, or citizens" was not before the court. *See* Pet. App. 13a.

2. The second question presented is whether the district court correctly dismissed the claim of the Disabilities Program providers as non-justiciable. The providers in that program voted against union representation and, therefore: (i) they are not represented by a union, (ii) there is no collective bargaining agreement, and (iii) there is no fair-share provision in a collective bargaining agreement obligating these workers to provide financial support to any union, let alone to the respondent unions. As such, the justiciability question essentially answers itself. The decision that petitioners rely upon as creating a conflict, *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010), was correctly distinguished by the court of appeals as involving an allegedly unlawful agreement that already existed. Pet. App. 16a ("This case is different because the only violations alleged by the plaintiffs may never occur."). In any event, the second question is too fact specific to merit further review.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

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REPLY BRIEF

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Respondents.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case presents the extraordinary circumstance of citizens being forced to lobby a state for more benefits from a public-aid program through an advocate the state itself has designated. The Respondent Unions attempt to disguise the constitutional significance of this action with a superficial application of labor law terminology. However, semantics cannot obscure the reality that the State of Illinois is compelling personal care providers to associate with an organization for the very purpose of "petition[ing] the Government for a redress of grievances." U.S. Const. amend I.

1. Foremost, calling providers State "employees" because their services to persons with disabilities are paid for by a State Medicaid program is both inaccurate and immaterial. (Unions' Br., 7). It is inaccurate because "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (service recipients)." *State of Ill. (Dep't of Cent. Mgmt. Serv. & Rehab. Serv.)*, 2 PERI P 2007, at *2 (1985), *superseded by* 2003 Ill. Legis. Serv. 93-204. Indeed, Illinois itself does not consider providers to be its employees, except for the sole purpose of collectivization. *See* 20 Ill. Comp. Stat. 2405/3(f); 89 Ill. Admin. Code § 676.10(c). Providers are truly employed only by the persons with disabilities who hire, train, direct, and supervise them. *See* 89 Ill. Admin. Code §§ 676.30(b), (p).

In any event, labeling providers State "employees" is immaterial because a government service provider's constitutional rights do not turn on such labels. *See O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 721 (1996). Nor do they turn on the degree to which a provider is dependent on government sources for income. *Id.* at 721-22. Thus, the fact that providers' services are paid for by a Medicaid program does not render them less than full "citizens" in their dealings with the State, as the Unions assert. (Union Br., 7). Indeed, if that were true, the constitutional rights of most of the medical profession would be diminished as a result of serving patients enrolled in Medicaid or Medicare. (*See* Petition, 24).

Most important here, that the State pays for providers' services does not give it a "labor peace" interest in using exclusive representation to quell "conflicting demands" from diverse groups of providers regarding their reimbursement rates. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977). As explained in the Petition for Certiorari, this managerial interest in avoiding workplace disruptions applies only to petitioning that occurs within the narrow confines of a master-servant relationship and a government workplace. It is inapplicable here because providers do not work in State workplaces or under State direction, but for disabled persons in their private homes. Thus, their expressive activities cannot disrupt any State workplace. If providers choose to petition the State over their Medicaid reimbursement rates through multiple associations, this will occur in public forums and in their capacity as citizens. In this forum, the State has no more legitimate interest in suppressing competing demands from providers than it does in imposing an exclusive representative on doctors to prevent them from lobbying the State for greater Medicaid reimbursements through multiple associations. (Petition, 11-21). Tellingly, the Unions proffer no rebuttal to this dispositive point.[1]

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[1] In fact, the Unions' brief only proves that the labor peace rationale is inapplicable here. The Unions acknowledge that the State's designation of the SEIU as the providers' representative does not prevent providers from petitioning the State through other organizations. (Unions' Br., 9). Thus, they acknowledge that the State has not freed itself from "the possibility of facing conflicting demands" from diverse groups of providers through its actions. *Abood*, 431 U.S. at 221. As this Court recognized in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), labor peace is unattainable in public forums because, unlike in a government workplace, the ability of individuals to petition through

Second, referring to providers' State-designated advocate as a "labor organization that the majority of providers chose as their representative" gets the Unions nowhere. (Union Br., 8). It does not alter the reality that the State is forcing *all* of the approximately 20,000 providers who care for participants in the Rehabilitation Program to accept and subsidize the SEIU as their representative vis-à-vis the State. Even if a majority of providers supported the SEIU in 2003, which is unknown,[2] it would not diminish the constitutional injury inflicted on each provider who does not want to associate with the SEIU. Indeed, the very purpose of the First Amendment is to protect individual rights from the tyranny of the majority. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Third, calling Medicaid reimbursement rates for home personal care "wages" or "terms of employment" has no legal significance. (Union Br., 8). Petitioning on this subject remains "a matter of public concern" entitled to full protection under the First Amendment, *see Borough of Duryea v. Guarnieri*, __ U.S. __ , 131 S. Ct. 2488, 2495 (2011), just as petitioning by doctors for greater Medicaid reimbursement would regard a matter of public concern. This is not a matter of "purely private concern" for providers. *Id.* at 2500.

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rival organizations cannot be suppressed. *Id.* at 521 (plurality opinion); (*see also* Petition, 16).

[2] Governor Blagojevich, in Executive Order 2003-08, recognized the SEIU as the representative of providers in the Rehabilitation Program *without* an election. (App. 46a-47a). It is not known at this stage of the proceedings if a majority of providers supported the SEIU at that time.

Fourth, to call the expressive activity that providers must support "collective bargaining" does not diminish its expressive nature. (Union Br., 10). Providers are compelled to subsidize private speech directed to the State to influence its Medicaid reimbursement rates and policies. This speech constitutes "petition[ing] the Government for a redress of grievances" within the meaning of the First Amendment. *See Guarnieri*, 131 S. Ct. at 2495. It is as much an expressive and political activity as is lobbying for greater Medicaid reimbursement rates.

The mere fact that the State is willing to listen to the SEIU's "speech" and be receptive to its efforts to "petition the Government" in a bargaining process does not change this reality. Nor does it justify compelling providers to support this expressive activity. Government cannot compel citizens to support an advocacy group by simply bargaining with it over policy issues that affect those citizens.

Finally, the Unions' attempt to dress up Illinois' scheme to look like that upheld in *Abood* fails because they are missing its most critical article: a compelling government interest in "labor peace." It is only because of this underlying interest that public employees can be compelled to support an exclusive representative to collectively bargain with their employer. *Abood*, 431 U.S. at 220-21, 224. As explained in the Petition and never rebutted by the Unions, this managerial interest in quelling disruptive petitioning within the workplace is absent here because providers do not work under State direction or in State workplaces. (Petition, 11-21). Accordingly, irrespective of what other parallels may or may not exist between providers and employees, they differ in the critical respect that the State has no compelling

justification for infringing on providers' First Amendment right to free expressive association.

2. The Unions' reliance on semantics is not only unavailing on the merits, but begs the question before this Court: Who can be deemed a government "employee" and subjected to exclusive representation under *Abood*? Who can be compelled to "collectively bargain" with the State, and over what subjects?

These are questions of exceptional importance that warrant this Court's immediate attention due to the ever increasing extension of exclusive representation beyond traditional public employees to individuals whose services are merely paid for by government. As explained in the Petition and by the *amici*, several states at the behest of the SEIU and AFSCME have already collectivized individuals who provide personal care to Medicaid recipients or who provide childcare to public-aid recipients. (Petition, 22-23; *Amicus* Brief of the Cato Institute et al., 18-21). These schemes will continue to spread to other states, and to other types of service providers. (Petition, 21-25; *Amicus* Brief of Cato Institute et al. 22-24). Notably, the Unions never dispute that this is their intention.

This extension of compulsory representation vis-à-vis government is inflicting significant and irreparable injury on the First Amendment rights of hundreds of thousands of personal care and childcare providers across the nation. The number of victims will only grow over time.

This Court should act now to stop this practice of government designating mandatory representatives for citizens before it takes even greater root, and further corrupts the democratic process. (*See*

Petition, 25-27). As this Court recognized in *United States v. United Foods*, 533 U.S. 405, 411 (2001), "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors."

At the very least, the lower courts need guidance as to what factors determine the outer limits of the compelled association permitted under *Abood*. Is a full employment relationship necessary? If not, what aspects of an employment relationship must be present to justify compulsory representation? Is government paying for the performance of a service itself sufficient? Given that these issues will be extensively litigated, this Court's immediate guidance is necessary.

For these reasons and those previously stated, the Petition for Writ of Certiorari should be granted.

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REPLY BRIEF

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No. 11-681

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v.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO RESPONDENT PAT QUINN'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT PAT QUINN'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

This petition does not "ask[ ] the Court to apply established legal principles to the specifics of this case," as the State of Illinois asserts. (State Br., 1). Instead, it asks the Court to establish what legal principles apply to the new, but increasingly common circumstance of states compelling individuals whose services are paid for by public-aid programs to support exclusive representatives to petition the State for more benefits from those programs. Specifically, what aspects of a public employment relationship must be present for the "labor peace" interest

recognized in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) to justify exclusive representation vis-à-vis government? This is an issue of exceptional and recurring importance that warrants this Court's immediate attention.

I. The Seventh Circuit's Legal Standard for Determining When Association Can Be Compelled For Purposes of Petitioning Government is Overly Broad and Inconsistent With This Court's Precedents

Legal standards must first be established before they can be applied to any given set of facts. The standard adopted by the lower court to determine when government can force individuals to associate with an exclusive representative to "petition the Government for a redress of grievances" is as erroneous as it is permissive. U.S. Const. amend. I. First, it wrongfully focuses on individuals' economic relationship with government, instead of whether government has a compelling interest for regulating how it can be petitioned. Second, the standard expansively redefines the labor peace interest in a manner inconsistent with this Court's precedents.

A. The Seventh Circuit's Legal Standard for Who Can Be Deemed a Public Employee Under *Abood* Incorrectly Focuses on Economic Factors and Could Encompass Anyone Who Accepts Government Money for Their Services

The State and lower court maintain that individuals can be deemed government "employees" for purposes of collectivization under *Abood* if a state program exerts "significant control" over their job, to wit it: (1) reimburses them for their services;

(2) defines which specific services are eligible for reimbursement; and (3) defines who is eligible to receive reimbursement. (State Br., 11) (App. 10a-11a). That an individual may be hired, managed, supervised, and otherwise employed by someone other than the state is considered irrelevant. (App. 11a).

These factors do not establish a common-law employment relationship with a state, *see Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-53 (1989), but only evidence that a state has chosen to subsidize particular services. The second and third factors do not suggest more, as the State contends. *See id.* at 752 ("the extent of control . . . [a] party exercises over the details of the product is not dispositive" in establishing an employment relationship). Any entity that pays for a service necessarily defines *what* services it will pay for and *who* it will pay to perform them. Thus, that Illinois' Rehabilitation Program pays only for services deemed necessary in a physician approved "service plan," and which are performed by personal assistants with minimal "qualifications," does not establish a master-servant relationship between the State and personal assistants. (*Id.*) (quoting App. 10a-11a). These are merely descriptions of w*hat* services are eligible for reimbursement under that Medicaid program.[1]

Such limits are common not only in home care programs, but fee-for-service Medicaid and Medicare programs generally. (*See* Pet., 24; *Amicus* Br. of Cato

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[1] For this reason, Petitioners characterization of the Seventh Circuit's holding as being that "a state is a joint employer if it pays for the provision of *defined* services" is completely accurate. (Pet. 23-24) (emphasis added).

Institute et al., 23). They are also inherent in government contracting, where government necessarily controls which services it wants performed and who it will pay to perform them. The ostensible state "control" that the Seventh Circuit held permits compulsory representation for personal assistants could be found to exist with almost any person or contractor who accepts money from government for performing particular services. (*Id.* at 21-25; *Amicus* Br. of Cato Institute et al., 22-24).

This result is unconscionable given that these economic factors are not justifications for infringing on individuals' First Amendment right to free expressive association. *See O'Hare Truck Service Inc. v. City of Northlake*, 518 U.S. 712, 722-23 (1996) (constitutional rights do not turn on common law distinctions between employees and independent contractors or the degree to which an individual is economically dependent on government).[2] Specifically, that a state program reimburses qualified individuals for performing certain services does not establish, or even bear upon, whether the state has a labor peace justification for requiring that individuals petition it through an exclusive representative.

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[2] The State attempts to distinguish *O'Hare* on the grounds that personal assistants are not being compelled to support political views, but rather collective bargaining under *Abood*. (State Br., 19). The contention fails because personal assistants *are* being compelled to support "political or ideological activities," (*id.* at 5), namely SEIU efforts to petition the State over its Medicaid programs. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) (unconstitutional to compel support for lobbying) (plurality opinion); *accord id.* at 559 (Scalia, J.) (same). At the very least, the State's contention only begs the question before the Court.

The relevant inquiry is whether a state has a compelling reason for regulating the expressive activity—here, the manner in which individuals associate to petition government. Logically, to force individuals to petition the state through an *exclusive* representative, the state must have a compelling reason for preventing the individuals from petitioning it through *multiple* representatives. *Cf. Abood*, 431 U.S. at 220-21, 244. States have such an interest with respect to individuals that they actively manage—i.e., their employees—because their diverse petitioning can disrupt the workplace and states can lawfully dictate how their employees interact with management on work time. (Pet., 11-19). But this interest is incognizable to individuals whose petitioning of the state occurs: (1) outside of a government workplace, and thus in public forums; or (2) when they are not being actively managed by the state, and thus are acting as citizens. (*Id.*). In either circumstance, such petitioning is unlikely to disrupt a government workplace. Even if it did, states have no legitimate interest in dictating how citizens associate to petition it in public forums. (*Id.*).

This is the proper test for determining the extent of the government's interests under *Abood*. Indeed, these two factors—whether the expressive activity takes place in the workplace and on work time—generally define and limit the government's authority to regulate the expressive activity of its own employees. (*See* Pet., 17-18).

Illinois attacks the first premise by asserting that some "public employees . . . regularly work outside a centralized government workplace, including bus drivers, police officers, and sanitation workers." (State Br., 16-17). However, all generally deal with their employer and interact with one another in a

centralized government workplace, namely the police station or motor pool. All are also actively managed by the State. Unlike personal assistants, these employees could disrupt a government workplace by attempting to petition their employer through rival associations in the workplace and on work time.

Illinois attacks the second premise by asserting that, even if personal assistants are not managed by the State, they should not be treated as "'citizens petitioning their State as sovereign'" because they are otherwise state employees. (*Id.* at 15) (quoting Pet., 16). This ignores that even true public employees cannot be subjected to exclusive representation when they petition government on their own time and in public forums, because at such times they are acting as citizens and not employees. (Pet., 17-18); *see City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976).

Here, personal assistants *always* act as citizens when petitioning the State over its Rehabilitation Program, because they never work under State direction or in government workplaces. They work solely under the direction of persons with disabilities in their private homes.[3] Thus, irrespective of their

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[3] From reading the State's brief, one would never know that persons with disabilities enrolled in the Rehabilitation Program, or "customers," are "the employer" of personal assistants ("PA") and are "responsible for *controlling all aspects of the employment relationship* between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." 89 Ill. Admin. Code § 676.30(b) (emphasis added); *see also id.* at § 684.20(b) (similar). Instead, one would have the false impression that the State actively controls

economic relationship with the State, the State lacks a cognizable interest in dictating how personal assistants associate to petition it for more monies from its Rehabilitation Program.

B. The State's Definition of Labor Peace is Inconsistent with this Court's Precedents and is Practically Limitless

Unable to rely on the labor peace interest identified in *Abood*, the State attempts to expansively redefine it. The State reaches back to this Court's reference to the interest as one in "stabilized labor management relations," *Railroad Employees' Dep't v. Hanson*, 351 U.S. 225, 234 (1956), and then leaps to the unsupported conclusion that these words encompass "an interest in coordinating and cooperating with the personal assistants to further the Program's goals," to include addressing "high turnover, low morale, excessive absenteeism, poor training, [or] lack of productivity" that may affect the Medicaid program. (State Br., 17).

This is not the interest in "labor peace" or "labor stability" identified by this Court, which is singularly focuses on how exclusive representation by *one* union may allow a public employer to avoid workplace problems caused by dealing with *multiple* unions.

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personal assistants as employees. (*See* State Br., 3-4, 11). State regulations expressly disclaim this conclusion. "Although DHS shall be responsible for ensuring that the funds available under the [Rehabilitation Program] are administered in accordance with all applicable laws, DHS *shall not have control or input* in the employment relationship between the customer and the personal assistants." 89 Ill. Admin. Code § 676.10(c) (emphasis added).

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Abood, 431 U.S. at 220-21; *see also Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983) ("exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools," as it "'serves to prevent the District's schools from becoming a battlefield for inter-union squabbles'") (citation omitted). In short, "[t]he confusion and conflict that could arise if rival teachers' unions . . . each sought to obtain the employer's agreement" are "the evils that the exclusivity rule . . . was designed to avoid." *Abood*, 431 U.S. at 224.

The State's attempt to transform "labor peace" into an amorphous "interest in coordinating and cooperating" with unions to further the goals of public-aid programs is completely unsupported by precedent. (State Br., 17). Indeed, it is nothing but a repackaging of the "feedback" rationale asserted in Illinois Executive Orders 2003-08 (4 Mar. 2003) (App. 40a) and 2009-15 (29 June 2009) (App. 45a), which is incognizable for the reasons stated on page 10 of the Petition and pages 11-12 of the *Amicus* Brief of the Cato Institute et al. States cannot compel citizens to

support an organization's petitioning of government on the grounds that it may help government officials develop better public policies.

The proposition that this Court must defer to the State with regard to what constitutes a labor peace interest is untenable. (State Br., 18). It is the prerogative of this Court to define exactly what interests are sufficiently compelling to justify infringing on citizens' First Amendment rights. The Court exercised this prerogative in *Abood* when defining the parameters of the labor peace interest. *See* 431 U.S. at 220-221. In so doing, it merely noted that it would defer to states regarding *whether* they wished to assert that interest by imposing exclusive representation on their employees. *Id.* at 228-29. But the Court certainly did not give states free license to define *what* interests will justify compelling individuals to associate to petition government.

Defining the parameters of the labor peace interest is an issue of exceptional importance, as it will largely dictate who can be subjected to exclusive representation vis-à-vis government. The definition proffered by the State is practically limitless. Logically it does not even require indicia of an employment relationship. An "interest in coordinating and cooperating with . . . [individuals] to further the Program's goals" could justify compulsory representation for anyone affected by a government program. (State Br., 17).

II. The Legal Standard Adopted by the Seventh Circuit Will Wrongfully Render Many Service Providers Susceptible to Mandatory Representation for Purposes of Petitioning Government

As the foregoing makes clear, the legal standards adopted by the Seventh Circuit and argued for by the State are so broad they render most individuals who serve public-aid recipients vulnerable to being collectivized for purposes of petitioning government. The State's argument that "the decision below is limited to Illinois' regulatory regime for personal assistants" ignores that this standard will govern all other instances of government compelled-representation in Illinois, Wisconsin, and Indiana, and elsewhere if adopted by other circuits. (State Br., 10). The Seventh Circuit itself recognized the precedential effect of its decision, acknowledging that "given our holding above" the constitutional claims of providers in Illinois' Disabilities Program "will not last long" if later adjudicated. (App. 17a).

In fact, First Amendment claims by personal assistants in the vast majority of the nation's participant-directed home care programs "will not last long" under the Seventh Circuit's permissive standard. (*Id.*). These Medicaid programs share the same basic features of the Rehabilitation Program. The programs pay in full for personal care services approved in a treatment plan, and allow participants to select, supervise, and manage the individuals who provide the care. *See* Janet O'Keefe et al, *Understanding Medicaid Home & Community Services: A Primer*, 179-189, 182 (U.S. Dep't of Health & Human Services, 2010 ed., 29 Oct. 2010) (available at http://aspe.hhs.gov/daltcp/reports/2010/primer10.pdf)

(accessed on 9 May 2012); 42 C.F.R. § 441.301(b) (home care services must be furnished pursuant to written plan of care).

To the extent that differences may exist between the Rehabilitation Program and other government programs in which service providers are collectivized, this is only a reason for *granting* certiorari. The differences make manifest the need for this Court to establish clear and proper legal standards governing when exclusive representation can be imposed.

For example, Illinois and fifteen (15) other states have passed laws or issued executive orders that authorize compulsory union representation for home childcare providers who serve families enrolled in government programs that subsidize their daycare costs (though some laws and orders were later repealed). (*See* Pet. 23). These daycare programs are similar in some respects to home care programs, and different in other respects. The constitutionality of these laws and orders are being challenged. *See Schlaud v. Snyder*, No. 1:10-cv-147 (W.D. Mich. 2011); *Parrish v. Dayton*, No. 12-CV-149 (D. Minn. 2012). However, the lower courts lack guidance on what factors are relevant to appraising the constitutionality of these schemes. The Court should supply that guidance by taking this case.

CONCLUSION

"First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods*, 533 U.S. 405, 411 (2001). Accordingly, the Seventh Circuit's overly-permissive standard for when government can force citizens to subsidize

a specific organization's efforts to "petition the Government" warrants this Court's immediate review. U.S. Const. amend I. The Petition for Certiorari should be granted.

Respectfully submitted,

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PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

A "fair-share" provision of a collective-bargaining agreement between the State of Illinois and a union representing certain personal assistants providing in-home care requires personal assistants who are not members of the union "to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." Pet. App. 5a (quoting collective-bargaining agreement). The questions presented are:

1. Whether the fair-share provision is consistent with the requirements of the First Amendment because the personal assistants subjected to it are employees of the State of Illinois.

2. Whether a First Amendment challenge brought by other personal assistants to the possible inclusion of a similar fair-share provision in a future collective-bargaining agreement is ripe even though those personal assistants voted against union representation, no collective-bargaining agreement exists, and the personal assistants are not subjected to any fair-share requirement.

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In the Supreme Court of the United States

No. 11-681

PAMELA HARRIS, ET AL., PETITIONERS

v.

PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

The First Amendment permits a State to require a public employee to furnish financial support to a union selected by a majority of the employee's co-workers, insofar as the union uses the fees for non-ideological, non-political collective-bargaining activity. The State of Illinois has authorized such a requirement for personal assistants who are paid by the State to provide in-home care on terms specified by the State. Petitioners, who are such personal assistants, brought suit, arguing that they are employees only of the individuals to whom they provide services, not the State,

and that the compelled financial support of the union violates their First Amendment rights. The court of appeals rejected that argument, concluding that the personal assistants are employed jointly by the State and service recipients. The court also held that the claims of other personal assistants are unripe, as those assistants voted against union representation and are not required to support any union.

1. a. In *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956), this Court upheld a provision of the Railway Labor Act, 45 U.S.C. 151 *et seq.*, that authorizes collective-bargaining agreements containing "union shop" requirements, which compel union membership as a condition of employment with a private railroad company. See 351 U.S. at 229 n.2 (reproducing 45 U.S.C. 152 Eleventh). Construing the statute to require financial support only for the union's collective-bargaining activities, *id.* at 235, the Court concluded that the statute's authorization of such arrangements did not offend the employees' First Amendment rights, *id.* at 238. Cf. *id.* at 235 (noting that if a collective-bargaining agreement required employees to support union activities "not germane to collective bargaining, a different problem would be presented") (footnote omitted); see *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963) (interpreting the Railway Labor Act as prohibiting union dues collected under a union shop agreement to be used for ideological or political purposes).

b. In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that *Hanson* applied in the public-employment context. In *Abood*, the Court considered a state statute authorizing public-sector collective-bargaining agreements containing "agency

shop" provisions, which required employees represented by a union, including non-members, to pay the union a fee equivalent to union dues. *Id.* at 211. The Court recognized that "[t]o compel employees financially to support their collective bargaining representatives has an impact upon their First Amendment interests" because "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union." *Id.* at 222. But the Court concluded that a legislature may reasonably determine that required support for the collective-bargaining activities of an exclusive union representative would "promote peaceful labor relations" by avoiding "confusion," "rivalries," and "conflicting demands" resulting from multiple agreements with multiple unions; and would eliminate the ability of non-union workers to be "free riders," benefiting from the union's representation while refusing to contribute to it. *Id.* at 219, 220, 221, 222. Those legislative assessments, the Court held, justify what "interference as exists" when an employee is required to contribute to the financial support of a union's collective-bargaining activities in either the private or the public sector. *Id.* at 222; see *id.* at 225.

The Court in *Abood* rejected the argument "that in the public sector collective bargaining itself is inherently 'political,' and that to require [government employees] to give financial support to it is to require the 'ideological conformity'" that *Hanson* identified as constitutionally problematic. 431 U.S. at 226. Although there are important differences between collective bargaining in the public and private sectors, *id.* at 227-228, the Court concluded that a public employee has no "weightier First Amendment interest than a

private employee in not being compelled to contribute to the costs of exclusive union representation," *id.* at 229; see *id.* at 230-232. Thus, the Court concluded, like an employee in the private sector, a public employee may not be compelled to pay for a union's political and ideological activities. *Id.* at 234-236; see *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1990). But the First Amendment does not bar a requirement that public employees financially support the collective-bargaining activities of the union that represents their interests, just as it does not bar a similar requirement in the private sector. *Abood*, 431 U.S. at 225-226, 229.

2. a. The State of Illinois has established programs, funded under Medicaid (Pet. App. 20a), to provide in-home services for individuals in need of long-term care who otherwise would face institutionalization due to medical impairment or mental disability. 20 Ill. Comp. Stat. 2405/3(f); 405 Ill. Comp. Stat. 80/2-1 *et seq.*; see 42 U.S.C. 1396n(c) (2006 & Supp. V 2011); 42 C.F.R. 440.180, 441.300-441.310. Under the Home Services Program (Rehabilitation Program), Illinois pays "Personal Assistant[s]" to provide specified services to individuals, identified as "Customer[s]." 89 Ill. Admin. Code § 676.30(b) and (p); see *id.* § 686.20 (specifying services). "For purposes of the [personal assistant] services performed" under the program, "the customer is responsible for controlling all aspects of the employment relationship between the customer and the [personal assistant]," including, "without limitation," such things as "locating and hiring," "training," "supervising," and disciplining the personal assistant. *Id.* § 676.30(b). The customer is also authorized to "terminat[e] the employment rela-

tionship between the customer" and the personal assistant. *Ibid.*

At the same time, the State also exercises considerable control over the personal assistant's employment. The State specifies the qualifications necessary for the position. 89 Ill. Admin. Code § 686.10 (identifying, among other things, requirements for age, skill, prior experience, and recommendations from prior employers). A counselor with the Illinois Department of Human Services prepares an individual service plan for each customer (subject to approval by the customer's physician, *id.* §§ 684.10(c), 684.75), identifying the services to be provided by the personal assistant, including "the specific tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, [and] the rate of payment for the service(s)." *Id.* § 684.50. The State also specifies the provisions that must appear in the employment agreement between the personal assistant and the customer. *Id.* § 686.10(h). The State pays the personal assistant's wages directly to the personal assistant, withholding state and federal taxes, *id.* §§ 676.200, 686.10(h)(10), 686.40, and customers may not supplement those wages, *id.* § 677.40(d); see 42 C.F.R. 447.15. The State also mandates an annual review of the personal assistants' performance, helps the customer conduct that review, and mediates any disagreement between the customer and the personal assistant. 89 Ill. Admin. Code § 686.30.

Illinois has adopted a similar program, the Home-Based Support Services Program (Disabilities Program), to provide in-home care for individuals who would otherwise be institutionalized due to mental

disability. See 59 Ill. Admin. Code §§ 117.100 *et seq.*; Pet. App. 3a ("The Disabilities Program functions similarly [to the Rehabilitation Program].").

b. The Illinois Public Labor Relations Act (PLRA) permits state employees to join labor organizations and bargain collectively, through their chosen representative, with their public agency employers over the terms and conditions of employment. 5 Ill. Comp. Stat. 315/6(a). When a public employer enters into a collective-bargaining agreement with an exclusive representative of its employees, the PLRA authorizes the agreement to contain a provision requiring employees who are not members of the union "to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." *Id.* 315/6(e). The public employer deducts such payments from the non-member employees' earnings and pays them to the union. *Ibid.*

In the mid-1980s, personal assistants under the Rehabilitation Program "sought to unionize and, under the [PLRA], collectively bargain with the State." Pet. App. 4a. A hearing officer of the Illinois State Labor Relations Board concluded that the State and "the service recipients were joint employers of the service providers." *Service Employees Int'l Union*, No. S-RC-115, 1985 IL LRB LEXIS 165, *1 (Dec. 19, 1985). But because the service recipients were not public employers, the hearing officer concluded that they were not subject to the PLRA or the Board's jurisdiction. *Id.* at *1-*2. "Without reaching the specific conclusions of the Hearing Officer as to the joint employer status," the Board agreed that the PLRA did not govern the personal assistants' employment.

Id. at *2. The Board stated that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the State of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (the service recipients)." *Ibid.* The Board believed that the State did "not exercise the type of control over the petitioned-for employees necessary to be considered, in the collective bargaining context envisioned by the Act, their 'employer' or, at least, their sole employer." *Id.* at *3.

In 2003, the Governor issued an executive order providing that the State would "recognize a representative designated by a majority of personal assistants [in the Rehabilitation Program] as the exclusive representative of all personal assistants" under the PLRA. Pet. App. 46a. A few months later, the Illinois General Assembly amended the PLRA expressly to cover personal assistants in the Rehabilitation Program. Pub. Act No. 93-204, § 5, 2003 Ill. Laws 1930. The amendments included personal assistants as "[p]ublic employee[s]," 5 Ill. Comp. Stat. 315/3(n), and designated the State of Illinois their "public employer," *Id.* 315/3(o), "[s]olely for the purposes of coverage under the [PLRA]," 20 Ill. Comp. Stat. 2405/3(f). As amended, the PLRA requires the State to "engage in collective bargaining with an exclusive representative" of personal assistants "concerning their terms and conditions of employment that are within the state's control." *Ibid.*; see 5 Ill. Comp. Stat. 315/7. The amendments expressly disclaimed an employment relationship between the State and personal assistants for any other purpose, including for purposes of tort

liability or retirement and health insurance benefits. *Id.* 315/3(n) and (o); 20 Ill. Comp. Stat. 2405/3(f).

c. After the PLRA was amended, "a majority of the approximately 20,000" personal assistants working under the Rehabilitation Program designated a union, respondent SEIU Healthcare Illinois & Indiana, "as their collective bargaining representative with the State." Pet. App. 4a-5a. The union and the State negotiated a collective-bargaining agreement setting pay rates with annual raises, establishing a committee to develop training programs, prohibiting the union or its members from striking, and establishing a grievance procedure to resolve disputes concerning the meaning or implementation of the collective-bargaining agreement. *Id.* at 5a; 1:10-cv-02477 Docket entry No. 32, Ex. D (N.D. Ill. June 15, 2010) (Collective Bargaining Agreement (Aug. 1, 2003) (2003 CBA)). The agreement also contained a "fair share" provision, requiring "all Personal Assistants who are not members of the Union . . . to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours, and other conditions of employment." Pet. App. 5a (quoting 2003 CBA Art. X, § 6).

In 2009, two rival unions petitioned for an election to determine an exclusive representative of the personal assistants providing services under the Disabilities Program.[1] Pet. App. 5a. A majority of those per-

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[1] Earlier in 2009, the Governor had issued an executive order providing that the State would "recognize a representative designated by a majority of the individual providers in the [Disabilities] Program as the exclusive representative of all such individual providers." Pet. App. 49a.

sonal assistants voted against such representation. *Ibid.* Thus, the conditions of their employment are not governed by a collective-bargaining agreement, and those personal assistants are not subject to any fair-share requirement.

3. a. Petitioners are personal assistants who provide in-home services under either the Rehabilitation Program or the Disabilities Program. Pet. App. 18a-19a. In 2010, they filed a putative class action under 42 U.S.C. 1983 against respondents—the State, the union representing personal assistants under the Rehabilitation Program, and the two unions that had sought to represent the personal assistants under the Disabilities Program. See 1:10-cv-02477 Docket entry No. 1, at 2 (N.D. Ill. Apr. 22, 2010) (Docket entry No. 1). The Rehabilitation Program petitioners claimed that, by compelling them to financially support the union, respondents "are abridging and violating" the personal assistants' First Amendment rights. *Id.* at 16. The Disabilities Program petitioners claimed that, "[b]y threatening to compel" them to financially support a union as their exclusive representative, respondents "are threatening" a similar impairment of their First Amendment rights. *Ibid.*

Petitioners sought to enjoin the State from enforcing the fair-share provision of the collective-bargaining agreement in the Rehabilitation Program; to obtain a declaration that Illinois law is unconstitutional to the extent it compels personal assistants to financially support an exclusive representative; to obtain damages equal to amounts withheld from them under that provision; and to obtain damages for the named Disabilities Program plaintiffs "for any monies that they spent, or spend in the future," to prevent the

respondent unions from becoming their exclusive representative. Docket entry No. 1, at 17-18.

b. The district court granted respondents' motion to dismiss. Pet. App. 20a. Petitioners argued that the State and the Rehabilitation Program personal assistants did not have "an employer-employee relationship." *Id.* at 32a. In the absence of such a relationship, petitioners urged, the fair-share requirement imposed on Rehabilitation Program personal assistants is "nothing short of compulsory political representation," *id.* at 29a (quoting petitioners' brief), amounting to compelled financial support of a union "for purposes of lobbying the State for additional benefits from a government program," *ibid.* The district court rejected petitioners' premise that the personal assistants are not state employees, noting the State's extensive control over the terms and conditions of their employment. *Id.* at 32a. Having recognized the personal assistants as state employees, the district court held that the union's dealings with the State did not cross the "hazy line" identified by *Lehnert* between collective bargaining and lobbying in the public sector. *Ibid.* (discussing 500 U.S. at 518-520).

The district court concluded that the claims of the Disabilities Program personal assistants were not properly before the court. Pet. App. 39a. Those personal assistants voted against union representation, and thus are not under a collective-bargaining agreement containing a fair-share provision. *Id.* at 37a. Petitioners did not allege that another election had been scheduled. *Ibid.* Even if they had, the court noted, the personal assistants again could vote against union representation. *Ibid.* And even if they decided to elect an exclusive representative, it would remain to

be seen whether the union would negotiate a collective-bargaining agreement containing a fair-share provision. *Ibid.* Because the claims of the personal assistants in the Disabilities Program involved "too many future events that may not occur as anticipated, or indeed may not occur at all," the district court dismissed those claims as unripe. *Ibid.* (internal quotation marks and citation omitted).[2]

c. The court of appeals affirmed in part and remanded in part. The court held that the Rehabilitation Program petitioners are state employees and that compelled financial support of collective bargaining is therefore permissible under the First Amendment. Pet. App. 7a-11a. Because the court was analyzing whether the personal assistants are state employees for purposes of the First Amendment, the court of appeals explained that it would "pay no particular heed" to petitioner's employment status under state law. *Id.* at 9a. Relying for purposes of First Amendment analysis on the "ordinary meaning" of "employer" as "[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages," *id.* at 10a (quoting *Black's Law Dictionary* 604 (9th ed. 2009)), the court of appeals concluded that the personal assistants are jointly employed by the State and the customers because the State has "significant control over virtually every aspect of a personal assistant's job." *Ibid.*; see *id.* at 10a-11a.

The court of appeals rejected petitioners' additional argument that, even if they are state employees,

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[2] Alternatively, the district court held that the Disabilities Program petitioners had failed to establish any injury in fact, and so failed to demonstrate standing. Pet. App. 37a-39a.

personal assistants cannot be compelled to support the union's collective-bargaining activities because the State has no interest in labor peace where, as here, the employees do not work in a centralized location. Pet. App. 11a-12a. Petitioner's argument, the court concluded, is inconsistent with *Hanson*'s and *Abood*'s recognition that the labor-peace interest includes "stabilized labor-management relations" that result from recognizing an exclusive representative, an interest the State has here. *Id.* at 12a (quoting *Hanson*, 351 U.S. at 234); see *id.* at 12a-13a (discussing *Abood*). The court therefore held that *Abood* is controlling and that the First Amendment rights of Rehabilitation Program personal assistants are not infringed by the requirement to contribute to the financial support of the union's collective-bargaining activities. *Id.* at 13a.

Finally, the court of appeals agreed with the district court's determination that the claims of the Disabilities Program petitioners are unripe. Pet. App. 15a. But because the district court had mistakenly dismissed those claims with prejudice, the court of appeals remanded for correction of that error. *Id.* at 16a-17a.

DISCUSSION

The court of appeals correctly determined that the State of Illinois and the individual customers under the Rehabilitation Program are joint employers of personal assistants. That fact-bound determination does not warrant review. Petitioners' argument that personal assistants are not state employees ignores the extensive control the State exerts over details of the personal assistants' work, as well as the other factors relevant to determining whether a hired party is an employee. The court of appeals therefore properly

held that, under *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), the personal assistants' First Amendment rights are not infringed by a requirement that they financially support the union's collective-bargaining activities. Because Rehabilitation Program personal assistants are public employees for those purposes, the court had no occasion to—and did not—consider what constraints the First Amendment would apply to a financial-support requirement "outside the employment context." Pet. App. 13a. The court of appeals also correctly held that because the Disabilities Program personal assistants voted against union representation, their challenge to a hypothetical fair share provision in a possible future collective-bargaining agreement is not ripe. The court's rulings do not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. As the court of appeals recognized (Pet. App. 9a), if the personal assistants are state employees, then *Abood* directly controls and the State may allow the union elected as their exclusive representative to require the personal assistants to contribute to the financial support of the union's collective-bargaining activities, even if some personal assistants disagree with the positions the union takes in its negotiations with the State. See *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 517 (1991) ("[A public] employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative."). The court of appeals correctly determined that personal assistants are properly regarded as pub-

lic employees for these purposes. That determination brings this case squarely within the holding in *Abood*.[3]

a. In determining whether a hired party is an employee for these purposes, it is appropriate to apply the general common law of agency. That is the approach the Court has taken in other contexts in determining "whether a hired party is an employee" for purposes of federal law that does not otherwise define the employment relationship. *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751 (1989) (*CCNV*); see *id.* at 751-752 & nn.18-31 (setting out a non-exhaustive list of factors and citing cases).[4] Among the factors this Court considers are

> the hiring party's right to control the manner and means by which the product is accomplished[;] * * * the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of

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[3] Petitioners do not contend that the financial support they provide to the union is used for any purpose other than collective bargaining activities.

[4] A state may choose to limit the consequences of its employment relationship for purposes of state law, as Illinois has done here. See 5 Ill. Comp. Stat. 315/3(n) and (o); 20 Ill. Comp. Stat. 2405/3(f). But a state law defining the scope of an employment relationship does not govern whether an individual may appropriately be considered a public employee for purposes of *Abood*, as the court of appeals correctly concluded. Pet. App. 9a.

> the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 751-752 (footnotes omitted) (citing, *inter alia*, Restatement (Second) of Agency § 220(2) (1958) (Restatement)); see *id.* at 752 n.31 ("In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency.").

b. Consideration of the Rehabilitation Program personal assistants' work in light of those factors shows that the State and customers jointly exercise basic authorities of an employer and exercise others individually. The State and customers are therefore the personal assistants' joint employers.

Both the State and customers exert considerable control over "the manner and means by which" (*CCNV*, 490 U.S. at 751) personal assistants provide home care services. See Restatement § 220 cmt. d ("[C]ontrol or right to control the physical conduct of the person giving service is important and in many situations is determinative."). The State directs personal assistants' work-related activities by identifying the particular services they may provide. 89 Ill. Admin. Code § 686.20 (personal assistants may perform "household tasks, shopping, or personal care," as well as "incidental health care tasks" and health and safety monitoring). The State further directs personal assistants' work by detailing, for each assistant, "the specific tasks" to be performed, "the frequency with which the specific tasks are to be provided," and "the number of hours each task is to be provided per month." *Id.* § 684.50. For their part, customers "supervis[e]" the daily work performed by personal assis-

tants. *Id.* § 676.30(b); see Restatement § 220(2)(c) (identifying as a factor whether "the work is usually done under the direction of the employer"). Thus, the State and customers together exercise "discretion over when and how long" (*CCNV*, 490 U.S. at 741) personal assistants will work.

The "method of payment," "the tax treatment of the hired party," and "the provision of employee benefits" (*CCNV*, 490 U.S. at 751-752) further support the conclusion that the State is an employer of personal assistants. The State determines the rate at which it will pay personal assistants, 89 Ill. Admin. Code § 684.50; it alone pays the providers' wages, *id.* § 677.40(d), 42 C.F.R. 447.15; and it pays personal assistants directly, 89 Ill. Admin. Code §§ 676.200, 686.40. Like other employers, the State withholds federal (and state) taxes, *id.* § 686.10(h)(10), consistent with the requirement that "every employer making payment of wages shall deduct and withhold upon such wages" appropriate federal taxes, 26 U.S.C. 3402(a)(1). And although personal assistants are not eligible for statutorily mandated benefits, see 5 Ill. Comp. Stat. 315/3(n); 20 Ill. Comp. Stat. 2405/3(f), pursuant to its collective-bargaining agreement with the union, the State provides funding for health benefits. 1:10-cv-02477 Docket entry No. 32, Ex. C, Art. VII, § 2 (N.D. Ill. June 15, 2010) (Collective Bargaining Agreement (Jan. 1, 2008)).

Customers also possess certain authority commonly ascribed to employers, although not to the exclusion of the State. "[T]he location of the work" (*CCNV*, 490 U.S. at 751)—in a customer's home (see 89 Ill. Admin. Code § 676.10(a))—is a factor supporting the conclusion that customers are also employers of personal as-

sistants. Although not expressly stated in the regulatory scheme, customers presumably are the principal "source of the instrumentalities and tools" (*CCNV*, 490 U.S. at 751) used by personal assistants providing care in a customer's home. Yet, through the collective-bargaining agreement, the State has undertaken to provide personal assistants with hygienic gloves, an important means of protecting personal assistants' health and safety, when those are not available at the customer's home. 2003 CBA Art. IX. Customers largely control "the duration of the relationship" (*CCNV*, 490 U.S. at 751) between themselves and the personal assistants, through their authority to hire and fire. 89 Ill. Admin. Code § 676.30(b). But customers may hire only personal assistants who meet the qualifications set by the State, *id.* § 686.10; customers and personal assistants must use an employment agreement containing requirements specified by the State, *id.* § 686.10(h); and the State may effectively fire personal assistants by withholding payment, *id.* § 676.200.

In sum, in their dealings with personal assistants, neither the State nor the customer exclusively exercises the complete range of authority characteristic of an employer. Rather, both exercise core components of that authority. That makes them the personal assistants' joint employers. See Pet. App. 10a.[5] Indeed,

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[5] Federal labor law recognizes that an individual may be an employee of joint employers. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 475-476 (1964) (discussing National Labor Relations Board decision that, under the National Labor Relations Act, two businesses "were joint employers, because they exercised common control over the employees"); *NLRB* v. *Greyhound Corp.*, 368 F.2d 778, 781 (5th Cir. 1966) (holding that substantial evidence support-

Illinois law reflects the interests of both customers and the State as joint employers. The State recognizes that a customer is "responsible for controlling all aspects of the employment relationship *between the customer and the [personal assistant]*," 89 Ill. Admin. Code § 676.30(b) (emphasis added). At the same time, the State reserves for itself the right to bargain collectively with the exclusive representative of personal assistants concerning those "terms and conditions of employment *that are within the state's control*," 20 Ill. Comp. Stat. 2405/3(f) (emphasis added); see 5 Ill. Comp. Stat. 315/7 (same).

Because personal assistants are appropriately regarded as State employees, the court of appeals correctly held that, under *Abood*, the First Amendment rights of personal assistants who are not union members are not infringed by the collective-bargaining agreement's fair-share provision, requiring those individuals to financially support the union's collective-bargaining activities. Pet. App. 11a ("In light of [the State's] extensive control [over personal assistants' work], we have no difficulty concluding that the State employs personal assistants within the meaning of *Abood*."); see *id.* at 9a-11a; *Abood*, 431 U.S. at 222-223, 229-230; *Lehnert*, 500 U.S. at 517.[6]

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ed NLRB's finding that businesses were joint employers), on remand, *Greyhound Corp.*, 376 U.S. 473 (1964); see also, *e.g.*, *NLRB* v. *Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982) ("[T]he 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.") (emphasis omitted).

[6] Petitioners remain "free to petition their neighbors and government in opposition to the union which represents them in the workplace," *Lehnert*, 500 U.S. at 521 (plurality opinion), and they

2. The court of appeals' decision does not warrant review by this Court. Petitioners' argument that the decision is inconsistent with this Court's precedent concerning the First Amendment rights of public employees lacks merit, and petitioners identify no circuit split on that question.

Petitioners contend that the personal assistants cannot be public employees "because they are neither managed by the State nor work in State workplaces." Pet. 19. But "whether [an entity] possesse[s] sufficient indicia of control to be an 'employer' is essentially a factual issue," *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), and so not worthy of this Court's review. In any event, petitioners are mistaken in suggesting that the State cannot jointly employ personal assistants with customers because personal assistants work in customers' homes and are supervised by them there. As we have explained, see pp. 14-17, *supra*, day-to-day supervision and the location of work are only two of the factors relevant to determining whether an employer-employee relationship exists. Other factors—including not only the State's direct payment of personal assistants as employees and provision of health care benefits to them, but also the State's control over "the manner and means by which" (*CCNV*, 490 U.S. at 751) they carry out their work—support

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do not allege that the State has retaliated against them for their opposition to the union, see Pet. App. 12a n.5. Thus, petitioners' reliance on cases such as *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488 (2011), and *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 U.S. 712 (1996), is misplaced. See, *e.g.*, Pet. 9, 20.

the conclusion that the State also is the personal assistants' employer.[7]

Petitioners place particular emphasis on the location of personal assistants' work in asserting that *Abood*'s "labor peace" rationale has no application where individuals "do not work in government workplaces." Pet. 15; see Pet. 15-16. Petitioners' argument misunderstands the nature of the "labor peace" rationale, both doctrinally and conceptually. As a doctrinal matter, this Court first articulated the "labor peace" rationale in a private employment context in which many employees have no centralized workplace. See *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956); see 45 U.S.C. 152 Eleventh (a) and (c) (authorizing imposition of union-shop requirement on, among others, engineers, conductors, and trainmen) (cross-referencing 45 U.S.C. 153(h)).

Conceptually, there is no reason that the benefits of labor stability are limited to employment in which workers share a common physical worksite. This Court has recognized that "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would

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[7] Petitioners contend repeatedly that the State "merely paid" for the personal assistants' services and that customers otherwise control all aspects of the personal assistants' work. See, *e.g.*, Pet. 21; Reply to Unions Br. in Opp. 2, 6, 7. But that assertion ignores the many ways in which the State controls the work performed by personal assistants. Accord Illinois Br. in Opp. 10-11. And petitioners misdescribe the court of appeals' decision in suggesting (Pet. 20; see also Reply to Illinois Br. in Opp. 3) that the court gave "dispositive" weight to the State's payments. See Pet. App. 10a-11a (concluding that personal assistants are employed by State in light of State's "extensive control" of their work).

be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." *Hanson*, 351 U.S. at 234.

Here, the State has a legitimate interest in using collective bargaining to structure its relationship with the personal assistants in its employ. The State's interest in labor peace includes avoiding "high turnover, low morale, excessive absenteeism, poor training, [and] lack of productivity" (Illinois Br. in Opp. 17), which can undermine the program the State created to assist vulnerable disabled individuals, and which can be addressed effectively through a collective bargaining system that gives personal assistants a greater stake in both the process and the outcome.

Moreover, once the State decided to allow personal assistants to form unions and collectively bargain with the State—a decision the validity of which petitioners do not challenge—the State's interest in recognizing an exclusive representative rested on the very elements of labor peace identified in *Abood*: avoiding the confusion resulting from enforcing multiple collective-bargaining agreements, preventing inter-union rivalries, freeing the employer from conflicting demands, and permitting the employer and union to reach an agreement free from attack by a rival union. 431 U.S. at 221; cf. Reply to Unions Br. in Opp. 3 n.1. Similarly, the recognition of an exclusive representative triggered the legitimate state interest in addressing the free-rider problem that would arise if individual personal assistants could benefit from the union's collective-bargaining activities without contributing to the financial support of those activities. See *Abood*, 431 U.S. at 222.

Finally, petitioners and their amici err in suggesting that "[n]o discernible principle limits" (Pet. 22) the court of appeals' decision. They note related contexts in which personal service providers are subject to fair-share provisions (*ibid.*), and they speculate that the court of appeals' ruling would support extending such a requirement to "physicians and nurses" (*ibid.*), "dentists" and "[a]ttorneys" (Cato Inst. Amicus Br. 23), "government contract[ors]" (Reply to Illinois Br. in Opp. 4), or even to recipients of monetary benefits such as social security (Ctr. for Const. Jur. Amicus Br. 11). Such speculation is misplaced and furnishes no basis for review by this Court.

The court of appeals' decision fits comfortably within *Abood*'s holding that the First Amendment permits States to require public employees to financially support the collective-bargaining activities of the employees' exclusive representative. Its ruling plainly does not apply to individuals who merely receive social security or other monetary benefits from the government. And the court expressly did not consider whether a State could impose financial-support requirements "outside the employment context." Pet. App. 13a; see *ibid.* (reserving question as applied to "[independent] contractors, health care providers, or citizens").[8]

3. In a brief, four-paragraph argument (Pet. 27-28), petitioners urge this Court to grant certiorari to re-

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[8] Highly skilled professionals and government contractors who are "engaged in a distinct occupation or business" (Restatement § 220(2)(b)), are specialists who work "without supervision" (*id.* § 220(2)(c)), provide their own tools (*id.* § 220(2)(e)), and are paid by the job rather than by time (*id.* § 220(2)(g)), are unlikely to be considered government employees.

solve a purported conflict with the Eleventh Circuit that, petitioners claim, was created by the Seventh Circuit's determination that the claims of the personal assistants in the Disabilities Program are not ripe for review. No such conflict exists, and no further review is warranted.

The Disabilities Program personal assistants voted against union representation, no collective-bargaining agreement governs their employment, and they are not subjected to a fair-share requirement. Pet. App. 5a. They nevertheless seek to enjoin the State from enforcing provisions of law that might someday result in the election of a union as their exclusive bargaining representative and the negotiation of a collective-bargaining agreement containing a fair-share provision. Docket entry No. 1, at 16-17. The court of appeals concluded that the Disabilities Program personal assistants' claim is not ripe because it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Pet. App. 14a (quoting *Evers* v. *Astrue*, 536 F.3d 651, 662 (7th Cir. 2008), in turn quoting *Texas* v. *United States*, 523 U.S. 296, 300 (1998)).

Petitioners contend (Pet. 28) that the Seventh Circuit's ripeness decision conflicts with the Eleventh Circuit's conclusion that "probabilistic harm is enough injury to confer standing in the undemanding Article III sense." *Mulhall* v. *UNITE HERE Local 355*, 618 F.3d 1279, 1288 (2010) (citation omitted), petition and cross-petition for cert. pending, No. 12-99 (filed July 20, 2012), and No. 12-312 (filed Aug. 22, 2012). But the court of appeals in this case did not address petitioners' standing or their alleged injury, and petitioners

have identified no other conflict with the Eleventh Circuit's decision.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] By order dated January 14, 2013, the Court invited the Solicitor General to file a brief expressing the views of the United States in *Mulhall*. The questions presented in *Mulhall*—involving the proper interpretation of 29 U.S.C. 186—are entirely distinct from the First Amendment issue in this case. There accordingly is no reason to hold the petition in this case pending the disposition of the petition and cross-petition in *Mulhall*.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 4 - 2012
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No. 11-681

In The Supreme Court of the United States

PAMELA HARRIS, et al.,

Petitioners,

v.

PAT QUINN, in His Official Capacity as Governor of the State of Illinois, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND MACKINAC CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state may, consistent with the First and Fourteenth Amendments, compel household workers who are neither hired nor supervised by the state to associate with, and subsidize the speech of, a labor union.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. The instant case concerns Cato because it raises vital questions about the ability of government to burden private citizens' exercise of their First Amendment associational and expressive rights.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small

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[1] Pursuant to Rule 37.2(a), all parties have received at least 10 days notice of *amici's* intent to file and have consented to the filing of this brief. In accordance with Rule 37.6, counsel to *amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents over 300,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Founded in 1988, the Mackinac Center for Public Policy is a Michigan-based nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The instant case concerns the Mackinac Center because it has challenged similar governmental activities within the State of Michigan.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners are personal assistants who provide in-home care to disabled family members and other

disabled persons participating in Illinois's Rehabilitation Program and are required by Illinois law to associate with Respondent SEIU Healthcare Illinois & Indiana ("SEIU") and to subsidize its speech made putatively on their behalf.[2] Under Illinois law, the program participant, or "customer," is "the employer of the PA [personal assistant]" and "is responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." 89 Ill. Admin. Code § 676.30(b); *see* 20 Ill. Comp. Stat. 2405/3(f) (restating customers' rights). Nonetheless, while expressly preserving customers' rights to hire, supervise, and terminate their personal assistants, the Illinois General Assembly in 2003 designated personal assistants to be "public employees" of the State of Illinois "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act," *id.*, which provides for collective bargaining. Shortly thereafter, the State designated SEIU as the exclusive representative for all personal assistants, and the State and SEIU subsequently entered into

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[2] In the interest of clarity, because *amici* address only the first question presented in the petition for a writ of certiorari, this brief limits its discussion to Illinois's Rehabilitation Program and refers as "Petitioners" to those plaintiffs below who provide care to individuals participating in that program.

a collective bargaining agreement that requires all personal assistants, including Petitioners, to remit compulsory fees, deducted automatically from their paychecks, to SEIU. App. 22a.

In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224-25 (1977), this Court upheld the constitutionality of assessing compulsory dues from public-sector workers to finance the expenditures of a labor union, reasoning that the "important" governmental interest in "labor peace" justified the impingement upon dissenting individuals' associational and expressive freedoms. The Seventh Circuit's decision carries *Abood* far beyond its holding and logic, absolving the State of Illinois of the burden of demonstrating any particular justification for the abrogation of the rights of workers who are not hired, maintained, or supervised by the State, who do not labor in State facilities, and whom the State does not consider to be its employees for any other purpose, such as benefits or vicarious liability.[1] Abandoning this Court's requirement that compelled association and expression be tailored to "the government's vital policy interest in labor peace," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), the Seventh Circuit was content to presume

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[1] The 2003 act specifically provides, "The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." 20 Ill. Comp. Stat. 2405/3(f).

such an interest based on Illinois's claim to be a co-employer due to its regulation and subsidization of personal assistants. App. 10a-11a. In this way, the opinion below provides a roadmap for lawmakers and labor leaders to circumvent the First Amendment's limitations on compelled association and speech and thereby bolster the ranks and finances of organized labor.

Indeed, the Illinois law at issue here is at the leading edge of a nationwide movement over the past decade to organize home-based care workers, including medical assistants and even family childcare providers, and thereby to "reinvigorate organized labor." Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1390 (2008). More than a dozen states have already implemented schemes like Illinois's – in which a state agency is designated as the employer of record for home workers and empowered to recognize a union representative on their behalf – through legislation or (particularly in the family childcare context) executive order.[4] No limiting principle in the decision below prevents the similar misapplication of *Abood's* "labor peace" rationale to curtail the First Amendment rights of any direct or indirect recipient of government subsidies or fees, including doctors and nurses participating in state Medicaid programs, attorneys representing the indigent in state courts, foster parents,

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[4] For a current list, *see* Pet. 22 n.10, 23 n.12.

and employees of businesses receiving state tax credits.

In sum, this case presents a question of great and recurring importance that the Court will inevitably be compelled to address. In light of states' increasing use of sham employment relationships to circumvent First Amendment protections and the ongoing injury to Petitioners and others similarly situated, the Court should act now to protect workers' associational and expressive rights before this phenomenon takes greater root in labor law and practice and becomes more costly and difficult to dislodge.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Decision Permits States To Circumvent Limitations On Forced Association And Compelled Speech Recognized By This Court

The Seventh Circuit improperly relieved Illinois of the burden of demonstrating a compelling interest justifying its infringement of personal assistants' First Amendment rights by holding that any worker who provides a service that is subsidized by government may be forced to associate with a labor union and to subsidize its speech.[5] App. 10a-11a. In so doing, the

[5] Even where, as in an agency-shop arrangement, a worker is not made to join a union, a mandatory "fair share" fee "interfere[s] in some way with an employee's freedom to associate for

(Continued on following page)

court sanctioned a cynical legislative scheme specifically designed to circumvent First Amendment protections that would otherwise block attempts to conscript independent workers to bolster the ranks and finances of organized labor.

This Court has quoted with approval Thomas Jefferson's dictum that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31. Accordingly, it has recognized that the "freedom of speech" guaranteed by the First Amendment "may prevent the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods*, 533 U.S. 405, 410 (2001) (citations omitted). Because "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors," schemes that compel such subsidies "must pass First Amendment scrutiny." *Id.* at 411. At the very least, the government's interest must be substantial, and the compulsion tailored to achieve that interest. *See id.* at 409-10 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

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the advancement of ideas, or to refrain from doing so, as he sees fit." *Abood*, 431 U.S. at 222.

Similarly, the Court has recognized that the freedom of association guaranteed by the First Amendment "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood*, 431 U.S. at 234-35). That freedom may be impinged only by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*; *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (same); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) ("exacting scrutiny"). This is a balancing test: "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Boy Scouts*, 530 U.S. at 658-59. And, consistently, even compelling state interests – eradicating discrimination, assuring equal access to places of public accommodation – have been found to be outweighed by the burden of government intrusion on associations that are, themselves, expressive. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574-75 (1995); *Boy Scouts*, 530 U.S. at 559. With equal consistency, the Court has upheld those laws that impose no "serious burden" on expressive association. *See Boy Scouts*, 530 U.S. at 658-59 (discussing cases); *New York State Club Assn. v. City of New York*, 487 U.S. 1, 13 (1988) (challenged antidiscrimination law "no obstacle" to club excluding "individuals who do not share the views that the club's members wish to promote"); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,

547 U.S. 47, 69 (2006) (challenged law "does not force a law school 'to accept members it does not desire'").

There can be no question but that Illinois's scheme to compel personal assistants' association with, and subsidization of, labor unions flunks traditional First Amendment scrutiny. As in *United Foods*, Illinois has instituted a system of "compelled subsidies for speech in the context of a program where the principal object is speech itself." 533 U.S. at 411. This is so because, as a matter of law, the State and union lack the traditional labor-management relationship that might be the basis for any broader regulatory activity. Federal law specifies the basic requirements for a Medicaid waiver program, such as Illinois's Rehabilitation Program, including that the State provide "payment for part or all of the cost of home or community-based services . . . which are provided pursuant to a written plan of care." 42 U.S.C. § 1396n(c)(1).[6] State law, in turn, lays out specific and objective requirements for personal assistants, 89 Ill. Admin. Code § 686.10, and their duties, which are limited to household tasks and contained in "service plans" approved by the customer's physician, §§ 686.20, 684.10. Crucially, state law is explicit that the customer – not the State or any other party – "is responsible for controlling all aspects of the employment relationship between the customer and the PA," from

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[6] Further requirements are provided by federal regulation. *See* 42 C.F.R. § 440.180 (requirements for home- or community-based services), § 441.301 (waiver requirements).

hiring to evaluation and termination. § 676.30(b). It is therefore the customer alone – and not the State – who is responsible for workplace conditions, supervision, and every aspect of the employment relationship but for one: compensation. The State has obliged itself to pay for care provided by personal assistants to Rehabilitation Program participants "at the hourly rate set by law." § 686.40.

Accordingly, the labor union, in this instance, can fulfill no role besides petitioning the State for higher wages or more generous benefits – that is, speech on behalf of its members. This is reflected in the collective-bargaining agreement struck between the State and SEIU, which largely echoes the preexisting requirements of federal and state law, but for pay, benefits, "union rights," and the all-important "fair share" requirement.[7] It is also confirmed by Illinois's initial authorization of exclusive representation for personal assistants, which relied solely on the purpose of "receiv[ing] feedback" from workers it deemed unable to "effectively voice their concerns about the organization of the [program], their role in the program, or the terms and conditions of their employment . . . without representation." Ill. Exec. Order 2003-08. Six years later, the State cited this very same

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[7] Agreement Between the State of Illinois, Departments of Central Management Services and Human Services, and the Service Employees International Union, Local 880, *available at* http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_seiupast.pdf [hereinafter "CBA"].

justification, again standing alone, for authorizing exclusive representation of providers in its Disabilities Program. Ill. Exec. Order 2009-15.

But Illinois has *no* legitimate interest, let alone a "substantial" one, in compelling personal assistants to subsidize "feedback" to the State for their own good. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). A state "may not substitute its judgment as to how best to speak for that of speakers and listeners." *Id.* at 791. Nor does the First Amendment permit it to "sacrifice speech for efficiency." *Id.* at 795. And if the State has no interest in this speech, it certainly has no "vital" interest in compelling association for the sole purpose of facilitating the speech.

Even if compelling "feedback" were a legitimate state interest, the means selected by Illinois are far too blunt. "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Elrod*, 427 U.S. at 362. In particular, a state may override the freedom of expressive association only where its interests "cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. If the State's genuine purpose is to seek feedback from personal assistants, it might survey or interview them or undertake any of a number of far "less drastic" alternatives. It therefore

may not command them to assemble for *the very purpose* of expressive association.

Whether viewed as a burden on associational or expressive rights, Illinois's scheme to compel the organization and speech of personal assistants who service participants in its Rehabilitation Program cannot survive traditional First Amendment scrutiny, reflecting the serious injury that the decision below works on the rights of Petitioners and those similarly situated.

For that reason, the State seeks refuge within the holding of *Abood* and its progeny, which propound a lesser "germaneness" standard for impositions on First Amendment rights incidental to broader regulatory programs. *See Abood*, 431 U.S. at 235-36; *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990); *Lehnert*, 500 U.S. at 519. But this standard too is unavailing.

Only where forced association or compelled subsidization of speech are incidental to some legitimate government interest may the government avoid exacting scrutiny of actions germane to that interest. *United Foods*, 533 U.S. at 413-14; *Abood*, 431 U.S. at 222. The State of Illinois may rely on neither of the interests, "labor peace" and avoiding "free riders," that *Abood* recognized may justify workers' forced association and subsidization of a labor union as a collective-bargaining agent.

First, Illinois has no interest in maintaining "labor peace" among household workers or family

members merely because they provide services to individuals who participate in a state program or because they are subject to state regulation. "Labor peace" is not an empty semantic vessel that the State may fill up merely by asserting that it is an employer. Rather, its contents were set at a time when Congress's Commerce Clause power was less robust than today, and the "labor peace" doctrine reflects its roots, referring to the pacification of those types of industrial discord that pose a threat to interstate commerce. *Maryland v. Wirtz*, 392 U.S. 183, 191 (1968) (explaining that the National Labor Relations Act was passed to address "substandard labor conditions" that could lead to "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce"); *see also N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-43 (1937); *Ry. Emp. Dept. v. Hanson*, 351 U.S. 225, 233 (1956); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring).

Abood expressly adopted this "familiar doctrine[ ]" as a justification for compelled speech and association in limited circumstances. 431 U.S. at 220; *id.* at 224 (explaining that a Michigan agency-shop provision was justified by the same "evils that the exclusivity rule in the Railway Labor Act was designed to avoid"). It described that doctrine thus:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of

> employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

431 U.S. at 220-21. *Ellis*, following *Abood*, explained that a union could charge a non-member only for union "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis v. Bhd. of Ry., Airline, & Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 448 (1984); *see id.* at 456 (citing *Abood*, *Hanson*, and *Street*).

Labor-management issues are necessarily absent here because Illinois does not manage the personal assistants who provide services to participants in its Rehabilitation Program and exercises no control over labor conditions. As described above, Illinois law provides that the program participant – not the State – "is responsible for controlling all aspects of the employment relationship between the customer and the PA." 89 Ill. Admin. Code 676.30(b); 20 Ill. Comp. Stat. 2405/3(f). Indeed, although the collective-bargaining agreement provides for a union-administered "grievance procedure," it does not apply to "any action

taken by the Customer" or, for that matter, the hiring, firing, or reduction in hours of a personal assistant. CBA, art. XI. Further, the confusion, rivalries, and dissension that may arise in a workplace absent an exclusive representative are inapplicable where, as here, there is no common or State-provided workplace at all and personal assistants carry out their duties in participants' homes. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor-peace *within the schools*.") (emphasis added). Because the State does not manage personal assistants and takes no responsibility for their labor conditions, it lacks the power to bargain with SEIU over the terms of employment that implicate labor peace.

Moreover, because the union is limited to the role of petitioning the State for greater pay and benefits, there can be no serious claim that its exclusive representation of workers in this activity has freed the State from any great burden due to "conflicting demands" by personal assistants. Surely the State faces more numerous and diverse demands by Rehabilitation Program beneficiaries seeking additional benefits – a group that it has yet to attempt to organize coercively – and other recipients and would-be recipients of State benefits. Petitioners have no greater or qualitatively different a relationship with the State than do other indirect recipients of State benefits, such as doctors serving Medicaid beneficiaries, and are, if anything, further attenuated from the State's

actions than direct beneficiaries, such as the Rehabilitation Program participants whom they serve.

Finally, federal and state labor laws reflect that the organization of household workers such as Petitioners does not further the interest of labor peace. The National Labor Relations Act ("NLRA") specifically excludes "any individual employed . . . in the domestic service of any family or person at his home" from coverage. 29 U.S.C. § 152(3). The Ninth Circuit, interpreting the NLRA shortly after its passage, described Congress's logic: "[T]here never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain." *North Whittier Heights Citrus Ass'n v. NLRB*, 109 F.2d 76, 80 (9th Cir. 1940). For similar reasons, until this past decade, states generally excluded such workers from coverage under their collective-bargaining statutes. *See* Peggie Smith, *Organizing the Unorganizable*, 79 N.C. L. Rev. 45, 61 n.71 (2000) (listing statutes).

Nor may Illinois rely on its interest in preventing "free riders" from taking advantage of the benefits of union representation, which this Court has in every instance recognized only as subsidiary to maintaining labor peace or some other legitimate interest, and never as a standalone interest. *See, e.g.*, *Hanson*, 351 U.S. at 233; *Street*, 367 U.S. 760-61; *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961) (Douglas, J., dissenting) (discussing *Hanson*); *Abood*, 431 U.S. at 220-21, 224; *id.* at 229 (for constitutional analysis, overriding

purpose of exclusive representation is "labor stability"); *Ellis*, 466 U.S. at 448; *United Foods*, 533 U.S. at 415-16. Indeed, this Court has expressly allowed nonmembers to "free ride" on union political expenditures that may accrue to their benefit, because such expenditures are not, themselves, justified by the labor peace doctrine. *See, e.g.*, *Street*, 367 U.S. at 770; *Abood*, 431 U.S. at 235-36; *Ellis*, 466 U.S. at 448 (nonmembers may be made to pay only for "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues"); *Lehnert*, 500 U.S. at 521; *id.* at 556-57 (Scalia, J., concurring and dissenting). If avoiding free riders could stand alone as a justification for compelled association and subsidization of speech, First Amendment rights would be powerless to resist government paternalism in any instance. That is not the law. *Riley*, 487 U.S. at 790 (rejecting a "paternalistic premise"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The Seventh Circuit's decision presses far beyond *Abood* to present a roadmap for states to compel independent workers or contractors to associate with a union for no other purpose than to subsidize speech favored by the state and its union allies. For good reason, this Court has never upheld compelled association or subsidies for speech detached from "some broader regulatory scheme," apart from the speech itself. *United Foods*, 533 U.S. at 415. "Were it sufficient to say speech is germane to itself, the limits

observed in *Abood* and *Keller* would be empty of meaning and significance." *Id.* The Court should act to avoid that very result in this instance.

II. The Petition Presents A Question Of Great And Recurring Importance

Though the court below took pains to "stress the narrowness" of its holding, App. 13a-14a, its decision carries major implications. More than a dozen states have, like Illinois here, established legally fictitious employer relationships for the purpose of facilitating the compelled organization of home-care workers, and the Seventh Circuit's decision sanctions these efforts, while encouraging other states to accede to campaigns by labor unions to do the same. Although to date these campaigns have focused on personal assistants like Petitioners and home childcare providers, no legal principle limits the use of this technique to those fields. Unless reversed by this Court, the decision below leaves all recipients of state funds, whether direct or indirect, vulnerable to compelled association with a labor union and subsidization of its speech.

A. Home Workers in Many States Are Being Denied Their First Amendment Rights

Though a recent phenomenon, the use of sham employment relationships to support mandatory union representation has spread rapidly across the nation. In just the decade since SEIU waged a "massive

campaign to pressure [ ] policymakers" in Los Angeles to authorize union bargaining for home-care workers,[8] home-based care workers "have become the darlings of the labor movement" and "helped to reinvigorate organized labor." Smith, *Publicization of Home-Based Care Work*, at 1390. From around zero a decade ago, now well more than one hundred thousand home workers are covered by collective-bargaining agreements. *Id.*

This quick growth is the result of a concerted campaign by national unions, particularly SEIU, to boost sagging labor-union membership through the organization of individuals who provide home-based services to Medicaid recipients. Since SEIU's Los Angeles victory in 1999, labor unions have undertaken successful campaigns to establish nominal employers for homecare workers in Oregon (2000), Washington (2001), Illinois (2003), Michigan (2004), Wisconsin (2005), Iowa (2005), Massachusetts (2006), Missouri (2008), Ohio (2009), Pennsylvania (2010), Connecticut (2011), Maryland (2011).[9] (Three states – Ohio, Pennsylvania, and Wisconsin – subsequently repealed this

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[8] *See generally* Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 Lab. Stud. J. 1 (2002).

[9] Smith, *Publicization of Home-Based Care Work*, at 1404; Pet. 22 n.10.

authority.) These campaigns have "been hailed as labor's biggest victory in over sixty years."[10]

Nor has this model been limited to homecare providers. Over the past five years, organized labor has directed its efforts to organizing home-based childcare providers, including childcare provided by family members who receive public support or subsidies. *See generally* Helen Blank, et al., *Getting Organized: Unionizing Home-Based Child Care Providers* (2010). By February 2007, seven states had recognized unions as the exclusive representative of home-based childcare providers; over the next three years, an additional seven states followed suit. *Id.* at 5. In five of these latter seven states, collective bargaining was instituted by executive order, rather than by legislation, reflecting the controversial nature of organizing home workers. *Id.* Two states, so far, have mandated some foster parents to support an exclusive representative. Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029.

While these types of organizing campaigns can be exceptionally expensive, owing to the changes to state law that are required, the representation of home workers can be quite lucrative for unions, which may explain the rapid spread of this phenomenon. The

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[10] Patrice M. Mareschal, *Agitation and Control: A Tactical Analysis of the Campaign Against New Jersey's Quality Home Care Act* 14 (undated), *available at* http://depts.washington.edu/pcls/caringlaborconference/Mareschalpaper.pdf.

approximately 20,000 personal assistants who provide care to Rehabilitation Program recipients pay SEIU over $3.6 million per year to support its activities. Pet. 6. In addition, the State contributes more than $10 million per year to a "Benefit Fund" "selected or established by the Union," as well as $9 million per year in "Additional State Funding" to be allocated at SEIU's "sole discretion." CBA, art. VII.

Given the vast sums of money and numbers of workers involved, as well as the gravity of the infringement of those workers' rights, it is natural that the issues raised by the petition have arisen in other litigation challenging similar arrangements. *See, e.g.*, *Serv. Employees Int'l Union, Local 434 v. Cnty. of L.A.*, 275 Cal. Rptr. 508, 510 (Ct. App. 1990); *State v. State Labor Relations Bd.*, 2005 WL 3059297 (R.I. Super. Ct. 2005) (an administrative decision defining home workers as state employees "offends any reasonable notion of orderly and responsible expansion of the State's workforce" and "may be applied to a myriad of groups that supply goods or services to the State"); *Schlaud v. Snyder*, No. 1:10-cv-147 (E.D. Mich. 2011) (granting summary judgment due to mootness in challenge to compelled unionization of home childcare workers who receive subsidies from the State of Michigan). If the Court does not act on the instant Petition, it will inevitably confront these issues in a future case.

B. No Limiting Principle Prevents The Seventh Circuit's Reasoning From Reaching Doctors, Nurses, Lawyers, And Government Contractors

Future cases, however, may not concern only home workers, but professional workers who, whether directly or indirectly, receive state funds. This is a result of the great breadth of the Seventh Circuit's holding, which (despite the lower court's protestations) cannot be logically limited to personal assistants.

While claiming to "pay no particular heed" to the State's designation of personal assistants as employees, App. 9a, the court propounded a standard scarcely, if at all, more demanding. A state may choose to be a "joint employer," it held, when it regulates a worker's activities (such as by approving the services to be provided), conducts performance reviews,[11] and pays for the services rendered. App. 11a. And because it is an "employer," it may categorically invoke the "labor peace" rationale, no matter the facts or circumstances of the asserted employment relationship, to take advantage of *Abood's* exception to traditional First Amendment scrutiny. App. 13a.

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[11] The court below erred on this count; the relevant regulation, to which it correctly cited, makes clear that annual reviews are conducted "by the customer" and that a State counselor is responsible only for providing "assistance," rather than conducting the review itself. 89 Ill. Admin Code § 686.30(a).

By this reasoning, a state may claim any recipients of state funds as employees and compel their unionization, even where (as in the instant case) the state's control over their work is minimal and its interest in quelling disruptive labor disputes nonexistent. Illinois, for example, imposes numerous conditions on medical providers, such as doctors, seeking to participate in its Medicaid program. *See* 89 Ill. Admin. Code § 140.11 *et seq.* Approved providers are paid by the State for care that they provide to beneficiaries, according to State regulation and at rates set by the State. § 140.23(a). The State even reserves the right to impose prior approval requirements on all services, § 140.40, as well as the right to conduct an audit of all services, § 140.30. As the State exercises far greater control over Medicaid providers than personal assistants, the decision below would allow Illinois to claim doctors, dentists, or nurses who provide services to Illinois Medicaid beneficiaries as State employees and then force those individuals to accept and pay a mandatory representative to "bargain" over the terms of their participation in the program.

Attorneys also may be swept up under this standard. Illinois law, for example, provides for the appointment of counsel on appeal to indigent defendants convicted of felonies and directs the State court to review the services rendered and approve payment. 725 Ill. Comp. Stat. 5/121-13(b). Again, the state specifies the attorney's duties and provides for his payment. He may therefore be claimed as an employee and made to support a union – despite that, as a

practical matter, the state exercises little or no control over the discharge of his duties and that its interest in his representation is commensurately minimal. The same would be true for any state contractor, recipient of state benefits, and potentially even employees of businesses receiving state tax credits or other incentives to create jobs within a state.

This situation should be a familiar one. This Court has already rejected the claim that "an independent contractor's First Amendment rights . . . must yield to the government's asserted countervailing interest in sustaining a patronage system." *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 720 (1996). The decision below, by absolving a state government of the burden of demonstrating any real interest in compelled association and speech, reverses *O'Hare* in *sub rosa* fashion: a state *may* maintain a patronage system, and compel its support, so long as that system is in the form of a labor union and the state claims its contractors, for that purpose alone, as its own employees.

CONCLUSION

The decision below upholds a state law designed to achieve no purpose other than to circumvent Petitioners' First Amendment rights to be free of compelled association and expression. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
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No. 11-681

In the Supreme Court of the United States

PAMELA HARRIS ET. AL.

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

CIVIL DOCKET FOR CASE # 10-cv-2477

Date Filed	#	Docket Text
04/22/2010	1	COMPLAINT filed by Pamela J Harris, Ellen Bronfeld, Wendy Patridge, Stephanie Yencer-Price, Patricia Withers, Theresa Riffey, Carole Gulo, Susan Watts, Michelle Harris, Gordon P Stiefel; Filing fee $350, receipt number 0752–4738954. (Messenger, William).
04/22/2010		CASE ASSIGNED to the Honorable Ronald A. Guzman. Designated as Magistrate Judge the Honorable Michael T. Mason.
04/26/2010	4	MINUTE entry before Honorable Ronald A. Guzman: The Court orders the parties to appear for an initial status hearing. All parties shall refer to and comply with Judge Guzman's requirements for the initial appearance as outlined in Judge Guzman's case management procedures, which can be found at: www.ilnd.uscourts.gov. Status hearing set for 6/23/2010 at 09:30 AM. Mailed notice.

05/06/2010	6	NOTICE by SEIU Local 73 Notice of Filing, Certificate of Service (Angelucci, Margaret).
05/17/2010	22	MINUTE entry before Honorable Ronald A. Guzman: Motion by Defendant AFSCME Council 31 for extension of time to file answer regarding complaint 14 is granted. Motion by Defendant Pat Quinn for extension of time to file answer 16 is granted. Motion by Defendant SEIU Healthcare Illinois &Indiana for extension of time to Answer or Otherwise Plead 18 is granted. Motion by Defendant SEIU Local 73 for extension of time to file answer regarding complaint 20 is granted. All answers are due by 6/18/10, as requested in the motions. The motion hearing date of 5/18/10 is stricken, parties do not need to appear in court. Mailed notice.
06/07/2010	26	MOTION by Defendant Pat Quinn to set a briefing schedule , expand page limits, and vacate the initial status hearing (Friebus, David)
06/08/2010	28	SUMMONS Returned Executed by Susan Watts, Pamela J Harris, Carole Gulo, Gordon P

		Stiefel, Ellen Bronfeld, Michelle Harris, Patricia Withers, Theresa Riffey, Wendy Partridge, Stephanie Yencer–Price as to AFSCME Council 31 on 4/29/2010, answer due 5/20/2010; Pat Quinn on 4/29/2010, answer due 5/20/2010; SEIU Healthcare Illinois & Indiana on 4/28/2010, answer due 5/20/2010; SEIU Local 73 on 4/28/2010, answer due 5/20/2010. (Messenger, William).
06/09/2010	29	MINUTE entry before Honorable Ronald A. Guzman: Notice of motion set for 6/10/10 is stricken. Motion by Defendant Pat Quinn to set a briefing schedule, expand page limits, and vacate the initial status hearing 26 is granted in part and denied in part. Defendants shall jointly file consolidated motion to dismiss up to and including 50 pages on or before 6/15/10. Plaintiffs' consolidated response up to and including 50 pages due 7/6/10. Defendants' consolidated reply up to and including 25 pages due 7/20/10. Ruling to be by mail. Status hearing reset to 7/28/2010 at 09:00 AM. Discovery shall not be stayed pending ruling on motion to dismiss. Mailed notice.

06/15/2010	30	MOTION by Defendant SEIU Healthcare Illinois & Indiana to dismiss—Defendants Consolidated Motions to Dismiss (Kronland, Scott).
06/15/2010	31	MEMORANDUM by SEIU Healthcare Illinois & Indiana in support of motion to dismiss 30—Defendants Memorandum in Support of Consolidated Motions to Dismiss (Kronland, Scott).
06/15/2010	32	Request for Judicial Notice by SEIU Healthcare Illinois & Indiana—Defendants' Request for Judicial Notice in Support of Consolidated Motions to Dismiss (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J) (Kronland, Scott).
07/02/2010	33	RESPONSE by Ellen Bronfeld, Carole Gulo, Michelle Harris, Pamela J Harris, Wendy Partridge, Theresa Riffey, Gordon P Stiefel, Susan Watts, Patricia Withers, Stephanie Yencer–Price in Opposition to motion by Defendant SEIU Healthcare Illinois & Indiana to dismiss-Defendants

		Consolidated Motions To Dismiss (Messenger, William).
07/20/2010	34	REPLY by Defendants AFSCME Council 31, Pat Quinn, SEIU Healthcare Illinois & Indiana, SEIU Local 73 to response in opposition to motion, 33 Defendants' Reply Memorandum in Support of Consolidated Motions to Dismiss (Kronland, Scott).
07/22/2010	35	REPORT of Rule 26(f) Planning Meeting (Messenger, William).
07/28/2010	37	MINUTE entry before Honorable Ronald A. Guzman: Status hearing held on 7/28/2010. Status hearing set for 8/16/2010 at 09:30 AM. Mailed notice.
08/11/2010	38	REPORT of Rule 26(f) Planning Meeting (Messenger, William).
08/11/2010	39	SUPPLEMENT to response in opposition to motion, 33 Citation of Supplemental Authority (Attachments: # 1 Exhibit A – 14 July 2010 Order in Schlaud, # 2 Exhibit B–Transcript Excerpts) (Messenger, William).
08/12/2010	40	RESPONSE by Pat Quinn, SEIU Healthcare Illinois & Indiana in Support of MOTION by Defendant SEIU Healthcare Illinois &

		Indiana to dismiss—Defendants Consolidated Motions To Dismiss 30 SEIU HCII's & Governor Pat Quinn's Response To Pls' Citation of Supplemental Authority (Kronland, Scott).
08/16/2010	41	MINUTE entry before Honorable Ronald A. Guzman: Status hearing held and continued to 2/9/2011 at 09:30 AM. Court adopts the parties discovery plan. Plaintiffs shall file their motion for class certification with supporting memoranda by 12/1/2010. The parties shall comply with FRCP(26)(a)(2) by 1/4/11. Rebuttal expert reports shall comply with FRCP(26)(a)(2) by 2/4/11. All discovery, including experts, shall be completed by 3/15/2011. Dispositive motions with supporting memoranda shall be filed by 4/15/2011. Advised in open court.
09/07/2010	43	EXECUTIVE COMMITTEE ORDER: It appearing that, pursuant to the Executive Committee Order entered on August 23, 2010, the civil cases on the attached list have been selected for reassignment to form the initial calendar of the Honorable Sharon Johnson Coleman, therefore IT IS HEREBY ORDERED That the attached

		list of 264 cases be reassigned to the Honorable Sharon Johnson Coleman. IT IS FURTHER ORDERED that this order shall become effective on Wednesday, September 8, 2010.
09/10/2010	44	MINUTE entry before Honorable Sharon Johnson Coleman: This case has been reassigned to the calendar of Judge Sharon Johnson Coleman. The parties are directed to meet and discuss the status of the case. The parties are to file a joint status report by 9/24/2010 in the form described in the courts webpage at http://www/ilnd.uscourts.gov/home/_assets_documents/webdocs_/coleman/InitialStatus.pdf. All pending status or hearing dates before the previously assigned district judge are vacated. All other dates to stand pending further order. Mailed notice.
09/13/2010	45	MOTION by Defendant SEIU Healthcare Illinois &Indiana to stay – Defs' Jt. Motion to Stay Discovery & Vacate Scheduling Order Pending Ruling on Motion to Dismiss (Kronland, Scott).

09/13/2010	46	DECLARATION of Scott A. Kronland regarding motion to stay 45 (Kronland, Scott).
09/15/2010	49	NOTICE of Voluntary Dismissal by Gordon P Stiefel Solely With Respect to Action of Plaintiff Gordon Stiefel (Messenger, William).
09/15/2010	50	MEMORANDUM by Ellen Bronfeld, Carole Gulo, Michelle Harris, Pamela J Harris, Wendy Partridge, Theresa Riffey, Susan Watts, Patricia Withers, Stephanie Yencer–Price in Opposition to motion to stay 45 (Messenger, William).
09/24/2010	52	STATUS Report Jointly Filed on Behalf of All Parties by Ellen Bronfeld, Carole Gulo, Michelle Harris, Pamela J Harris, Wendy Partridge, Theresa Riffey, Susan Watts, Patricia Withers, Stephanie Yencer–Price (Messenger, William).
11/12/2010	54	MINUTE entry before Honorable Sharon Johnson Coleman: Defendants' motion to dismiss 30 is granted and the case is dismissed. See Memorandum and Order for details. Mailed notice.

11/12/2010	55	ENTERED JUDGMENT Signed by the Courtroom Deputy on 11/12/2010: Mailed notice.
11/12/2010	56	MEMORANDUM Opinion and Order Signed by the Honorable Sharon Johnson Coleman on 11/12/2010: Mailed notice.
12/10/2010	57	NOTICE of appeal by Ellen Bronfeld, Carole Gulo, Michelle Harris, Pamela J Harris, Wendy Partridge, Theresa Riffey, Susan Watts, Patricia Withers, Stephanie Yencer–Price regarding orders 56 , 54 , 55 Filing fee $ 455, receipt number 0752–5506907. (Messenger, William).
09/23/2011	64	MANDATE of USCA dated 9/23/2011 regarding notice of appeal, 57; USCA No.10–3835. Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.
09/23/2011	65	CERTIFIED copy of order dated 9/23/2011 from the 7th Circuit regarding notice of appeal, 57; Appellate case no.: 10–3835. The judgment of the District Court is AFFIRMED in part and the case

		is REMANDED in part with instructions. The above is in accordance with the decision of this court entered on this date. Each party to bear its own costs.
09/23/2011	66	OPINION from the USCA for the 7th Circuit; Argued 6/92011; Decided 9/1/2011 in USCA case no. 10–3835.

RELEVANT DOCKET ENTRIES FOR THE UNITES STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CIVIL DOCKET FOR CASE # 10-cv-3835

Date Filed	#	Docket Text
12/10/2010	1	Private civil case docketed. Fee paid. Docketing statement filed. Transcript information sheet due by 12/27/2010. Appellant's brief due on or before 01/19/2011 for Ellen Bronfeld, Carole Gulo, Michelle Harris, Pamela J. Harris, Wendy Partridge, Theresa Riffey, Susan Watts, Patricia Withers and Stephanie Yencer-Price. Record on Appeal from Northern District of Illinois, Eastern Division due by 01/03/2011.
12/13/20201	2	A review of the short record reveals that this appeal involves more than one appellee represented by different counsel. Counsel for appellees are encouraged to file a joint brief and appendix or adopt parts of a co-appellee's brief. The parties are reminded that redundant and uncoordinated briefing will be stricken. See United States v. Torres, 170 F.3d 749 (7th Cir.

		1999); United States v. Ashman, 964 F.2d 596 (7th Cir. 1992).
02/25/2011	16	Filed motion by Non-Party Care Association, Inc. to file amicus brief. 15 copies Amicus Curiae Brief tendered.
02/25/2011	17	15 copies Appellant's brief filed by Appellants Ellen Bronfeld, Carole Gulo, Michelle Harris, Pamela J. Harris, Wendy Partridge, Theresa Riffey, Susan Watts, Patricia Withers and Stephanie Yencer-Price.
03/11/2011	19	Order re: 1) Motion of Private Care Association, Inc. for Leave to File an Amicus Curiae Brief in Support of Reversal. 2) Opposition to Motion of Private Care Association, Inc. for Leave to File Amicus Curiae Brief is DENIED.
04/20/2011	24	15 copies Appellee's brief filed by Appellees AFSCME Union Council 31, SEIU Healthcare Illinois & Indiana and SEIU Local 73.
04/20/2011	25	15 copies Appellee's brief filed by Appellee Pat Quinn.
05/04/2011	27	Appellant's reply brief filed by Appellants Ellen Bronfeld, Carole Gulo, Michelle Harris, Pamela J. Harris, Wendy Partridge, There-

		sa Riffey, Susan Watts, Patricia Withers and Stephanie Yencer-Price. Paper copies due on 05/11/2011.
05/10/2011	29	Argument set for Thursday, June 9, 2011, at 9:30 a.m. in the Main Courtroom, Room 2721. Each side limited to 20 minutes.
06/09/2011	32	Case heard and taken under advisement by panel: Daniel A. Manion, Circuit Judge; Diane P. Wood, Circuit Judge and David F. Hamilton, Circuit Judge.
06/09/2011	33	Case argued by Mr. William L. Messenger for Appellants Michelle Harris, Pamela J. Harris, Ellen Bronfeld, Carole Gulo, Wendy Partridge, Theresa Riffey, Susan Watts, Patricia Withers and Stephanie Yencer-Price, Mr. Paul Berks for Appellee Pat Quinn and Scott A. Kronland for Appellee SEIU Healthcare Illinois & Indiana.
09/01/2011	34	Filed opinion of the court by Judge Manion. The judgment of the district court is AFFIRMED in part and the case is REMANDED in part with instructions. Daniel A. Manion, Circuit Judge; Diane P. Wood,

		Circuit Judge and David F. Hamilton, Circuit Judge.
09/01/2011	35	ORDER: Final judgment filed per opinion. Each party to bear its own costs.
09/23/2011	36	Mandate issued. No record to be returned.
12/06/2011	37	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 11-681.
10/01/2013	38	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. 11-681.

COMPLAINT, DIST. CT. DOCKET # 1 (4/22/10)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No. 1:10-cv-02477

PAMELA J. HARRIS, ELLEN BRONFELD, CAROLE GULO, MICHELLE HARRIS, WENDY PARTRIDGE, THERESA RIFFEY, GORDON P. STIEFEL, SUSAN WATTS, PATRICIA WITHERS, STEPHANIE YENCER-PRICE, and a class of similarly situated,

Plaintiffs

v.

GOVERNOR PAT QUINN, in His Official Capacity as Governor of the State of Illinois SEIU HEALTHCARE ILLINOIS & INDIANA SEIU LOCAL 73, and AFSCME COUNCIL 31,

Defendants.

COMPLAINT—CLASS ACTION

Preliminary Statement

Plaintiffs are individuals who provide home care to disabled individuals enrolled in Illinois Medicaid-waiver programs. They are not employed by the State of Illinois, but by the individuals who they serve. Nevertheless, under former Illinois Governor Blagojevich, the State designated a union to be the representative of one group of home care providers vis-a-vis the State, and is compelling these providers to financially support that union as their state-appointed representative. Current Illinois Governor

Quinn is attempting to impose a similar scheme of compulsory political representation on a second group of home care providers.

Compelling home care providers to support an entity for the purposes of speaking to and petitioning the state infringes on the fundamental rights of providers to free association, free speech, and to petition the government for a redress of grievances under the First Amendment to the United States Constitution. This suit by home care providers seeks declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983 to remedy this violation of their Constitutional rights.

JURISDICTION AND VENUE

1. This Court has jurisdiction to adjudicate this case pursuant to both 28 U.S.C. § 1331, because it arises under the United States Constitution, and 28 U.S.C. § 1343, because Plaintiffs seek relief under 42 U.S.C. § 1983. This Court also has the authority under 28 U.S.C. §§ 2201 and 2202 to grant declaratory relief and other relief based thereon.

2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391 and 1392 because Defendants maintain offices and do business within this judicial district and events giving rise to this action took place in this judicial district.

PARTIES

3. Plaintiffs are individuals who provide home care services to disabled individuals enrolled in one of two state Medicaid programs: (1) the Home Services Program administered by the Division of Rehabilitation Services of the Illinois Department of Human Ser-

vices, ("Rehabilitation Program"); or (2) the Home Based Support Services Program for Mentally Disabled Adults administered by the Division of Developmental Disabilities of the Illinois Department of Human Services ("Disabilities Program"). More specifically:

3a. Plaintiff Pamela J. Harris provides home care services to her son Joshua, who participates in the Disabilities Program. Joshua requires constant care and supervision due to Rubinstein-Taybi syndrome, a rare genetic syndrome that adversely affects his cognitive abilities, muscular and skeletal systems, and causes severe intellectual and developmental disabilities.

3b. Plaintiff Michelle Harris provides home care services to her brother Joshua, who participates in the Disabilities Program and whose condition is described in paragraph 3a.

3c. Plaintiff Ellen Bronfeld provides home care services to her son Noah, who participates in the Disabilities Program. Noah requires constant care and supervision for his safety and to maximize his quality of life due to severe autism.

3d. Plaintiff Carole Gulo provides home care services to her son Jonathon, who participates in the Disabilities Program. Jonathon requires constant care and supervision due to Batten disease (Neuronal Ceroid Lipofuscinoses), a terminal neurological disorder that causes seizures and declining cognitive, visual, and motor skill functions.

3e. Plaintiff Wendy Partridge provides home care services to her son, who participates in the Disabilities Program.

3f. Plaintiff Theresa Riffey provides home care services to her sister, who participates in the Rehabilitation Program due to quadriplegia.

3g. Plaintiff Gordon P. Stiefel provides home care services to his daughter Pamela, who participates in the Disabilities Program. Pamela requires constant care and supervision due to Rett syndrome, a neurodevelopmental disorder that results in profound cognitive and motor developmental disabilities.

3h. Plaintiff Susan Watts provides home care services to her daughter Elizabeth, who participates in the Rehabilitation Program. Elizabeth requires constant care and supervision due to quadriplegic cerebral palsy, a stroke, and numerous surgeries.

3i. Plaintiff Patricia Withers provides home care services to her son Derek, who participates in the Disabilities Program. Derek requires constant care and supervision due to Asperger syndrome and other disorders that severely impair his judgment and organizational skills.

3j. Plaintiff Stephanie Yencer-Price provides home care services to an individual who participates in the Rehabilitation Program.

4. Defendant Governor Pat Quinn is sued in his official capacity as the Governor and chief executive officer of the State of Illinois.

5. Defendants SEIU Healthcare Illinois & Indiana and SEIU Local 73 (collectively "SEIU") are affiliated

labor unions that transact business and maintain their main offices in this judicial district.

6. Defendant American Federation of State, County, and Municipal Employees Council 31 ("AFSCME") is a labor union that transacts business and has one of its two main offices in this judicial district.

FACTS

I. Home Care Programs

A. The Rehabilitation Program

7. The Home Services Program is a state Medicaid waiver program administered by the Division of Rehabilitation Services of the Illinois Department of Human Services ("Rehabilitation Program"). *See* 20 ILCS 2405 et seq.; 89 Ill. Admin. Code §§ 676 *et seq.* The Rehabilitation Program subsidizes the costs of home-based services for individuals with severe disabilities to prevent their unnecessary institutionalization.

8. The maximum monthly subsidy to which a participant in the Rehabilitation Program is entitled to purchase home-based services, or "service cost maximum "is determined by a formula delineated at 89 Ill. Admin. Code § 679.50.

9. Participants in the Rehabilitation Program may use some or all of their subsidy to employ personal assistants or personal care attendants (collectively "Personal Assistants"), who help with household tasks, personal care, and certain routine health care procedures.

10. Personal Assistants are employed by participants in the Rehabilitation Program, who are their em-

ployers. Program participants may select and hire any individual who meets certain minimal requirements to serve as their Personal Assistant. Program participants supervise, discipline, and otherwise control the terms and conditions of employment of their Personal Assistants, subject to state minimum wage and qualification requirements.

11. Personal assistants are not employed by the State of Illinois. The State does not control or have input in the employment relationship between program participants and their Personal Assistants, other than to require a minimum wage rate. The State Rehabilitation Program merely subsidizes a program participant's costs of hiring a Personal Assistant by making semi-monthly payments to Personal Assistants based on the minimum wage rate.

12. Approximately 20,000 Personal Assistants are employed by participants in the Rehabilitation Program at any given time.

B. The Disabilities Program

13. The Home Based Support Services Program for Mentally Disabled Adults ("Disabilities Program") is a state Medicaid-waiver program administered by the Division of Developmental Disabilities of the Illinois Department of Human Services. *See* 405 ILCS 80/20-1 *et seq.*; 59 Ill. Admin. Code §§ 117 *et seq.* The program subsidizes the cost of home-based services for adults with severe mental disabilities to prevent unnecessary institutionalization.

14. The maximum subsidy that a participant in the Disabilities Program can receive is set by statute as

a percentage of a participant's social security payments. *See* 405 ILCS 80/2-6.

15. Participants in the Disabilities Program may use some or all of their subsidy to hire individuals to provide personal care and certain health services to them in their home (hereinafter "Providers").

16. Providers are employed by participants in the Disabilities Program, who are their employers. Program participants select, hire, fire, supervise, discipline, and otherwise control the terms and conditions of employment of their Providers. Program participants generally exercise these functions through a legal guardian.

17. Providers are not employed by the State of Illinois. The State does not control the employment relationship between program participants and their Providers. The State merely subsidizes a participant's costs of hiring a Provider.

18. Approximately 4,500 Providers serve participants in the Disabilities Program.

II. Personal Assistants in the Rehabilitation Program Are Compelled to Support the SEIU as Their State-Appointed Representative

A. The State Designates the SEIU as the Political Representative of Personal Assistants Vis-a-Vis the State with Respect to a Limited Aspect of the Rehabilitation Program

19. In 2003, former Illinois Governor Blagojevich initiated a two-step scheme to force Personal Assistants into the SEIU in exchange for the union's polit-

ical support and campaign contributions. Governor Blagojevich first designated the SEIU as the representative of Personal Assistants vis-a-vis his administration, and then forced Personal Assistants to pay the SEIU for the compulsory political representation imposed upon them.

20. On 7 March 2003, Governor Blagojevich issued Executive Order 2003-08 ("EO 2003-08"). EO 2003-08 recognized that Personal Assistants are not state employees, and that participants in the Rehabilitation Program control their hiring, in-home supervision, and termination. Nevertheless, EO 2003-08 provided that:

> The State shall recognize a representative designated by a majority of the personal assistants as the exclusive representative of all personal assistants, accord said representative all the rights and duties granted such representatives by the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq., and engage in collective bargaining with said representative concerning all terms and conditions of employment of personal assistants working under the Homes Services Program that are within the State's control.

21. On 16 July 2003, Governor Blagojevich codified EO 2003-08 by signing Public Act 93-0204, which amended Section 3 of the Disabled Persons Rehabilitation Act to provide as follows:

> Solely for the purposes of coverage under the Illinois Public Labor Relations Act (5 ILCS 315), personal care attendants and personal assistants providing services under the Department's Home Services Program shall be considered to

> be public employees and the State of Illinois shall be considered to be their employer as of the effective date of this amendatory Act of the 93rd General Assembly, but not before. The State shall engage in collective bargaining with an exclusive representative of personal care attendants and personal assistants working under the Home Services Program concerning their terms and conditions of employment that are within the State's control. Nothing in this paragraph shall be understood to limit the right of the persons receiving services defined in this Section to hire and fire personal care attendants and personal assistants or supervise them within the limitations set by the Home Services Program. The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal care attendants and personal assistants shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/).

20 ILCS 2405/3(f). Public Act 93-0204 also made conforming amendments to the Illinois Public Labor Relations Act, 5 ILCS 315/1, et seq.

22. On or around 26 July 2003, the State designated SEIU Healthcare Illinois & Indiana as the exclusive representative of Personal Assistants with respect to terms and conditions of their employment within the State's control under the Rehabilitation Program.

These terms and conditions are limited principally to the minimum compensation paid to Personal Assistants, as Personal Assistants are employed and supervised by participants in the Rehabilitation Program.

23. In this manner, the State designated SEIU Healthcare Illinois & Indiana as the compulsory representative of Personal Assistants for the purpose of speaking to, petitioning, and otherwise lobbying the State and its officials with respect to limited aspects of the State's Rehabilitation Program.

B. The State Compels Personal Assistants to Financially Support the SEIU As Their State-Designated Representative

24. The Illinois Department of Human Services and Central Management Services are parties to an "Agreement" with SEIU Healthcare Illinois & Indiana effective from 1 January 2008 through 30 June 2012. This Agreement is the successor to an earlier agreement between the entities.

25. The Agreement requires that Personal Assistants employed by participants in the Rehabilitation Program pay a compulsory fee to SEIU Healthcare Illinois & Indiana. Specifically, Section 6 of Article X of the Agreement states:

> Effective on the pay period beginning November 1, 2003, all Personal Assistants who are not members of the Union shall be required to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment, but

> not to exceed the amount of dues uniformly required of members. The Union shall certify the Personal Assistants' monthly proportionate share to the State and the State shall deduct said amount from the wages of the Personal Assistants and remit it to the Union. The Union shall indemnify, defend, and hold the State harmless against any claim, demand, suit or liability arising from any action taken by the State in complying with this section.

26. At all times relevant to this Complaint, the State has deducted compulsory union fees from monies owed to Personal Assistants for caring for participants in the Rehabilitation Program and remitted those monies to SEIU Healthcare Illinois & Indiana. These and similar deductions will continue until enjoined.

27. SEIU Healthcare Illinois & Indiana is acting under color of state law by causing, participating in, and accepting the compulsory deduction of union fees from monies owed to Personal Assistants.

28. SEIU Healthcare Illinois & Indiana and its affiliates take at least $3,600,000 in fees from Personal Assistants each year by means of these deductions, with the actual yearly windfall likely more than double this amount.

29. In the manner described above, Defendants are compelling Personal Assistants to financially support SEIU Healthcare Illinois & Indiana and its affiliates as their state-designated representative for purposes of speaking to, petitioning, and otherwise lobbying the State and its officials with respect to limited aspects of the Rehabilitation Program. No compelling

or otherwise sufficient government interest justifies the compulsory political representation imposed upon Personal Assistants.

III. Governor Quinn's Campaign to Designate The SEIU As The Political Representative of Providers in the Disabilities Program

30. In June 2009, Illinois Governor Quinn initiated a scheme to force Providers in the Disabilities Program into the SEIU in exchange for the SEIU's political support and campaign contributions.

31. On 29 June 2009, Governor Quinn issued Executive Order 2009-15. The order is similar to former Governor Blagojevich's EO 2003-08, and provides in relevant part that:

> The State shall recognize a representative designated by a majority of the individual providers in the Home-Based Support Services Program as the exclusive representative of all personal assistants, accord said representative all the rights and duties granted such representatives by the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq., and engage in collective bargaining with said representative concerning all terms and conditions of the provision of services within the State's control, including the setting of minimum rates of payment to individual providers.

32. SEIU Local 73 petitioned for an election to become the exclusive representative of Providers pursuant to EO 2009-15. AFSCME intervened in this election. A mail ballot election was scheduled for 1 October 2009 to 19 October 2009.

33. Governor Quinn supported SEIU Local 73's campaign against Providers, including by illegally attempting to gag private parties from speaking against SEIU Local 73. Specifically, the Illinois Department of Human Services sent letters to service facilitators—private persons and entities that assist participants in the Disabilities Program—that threatened their contractual status with the State if they spoke about or against unionization.

34. If unionized under EO 2009-15, Providers will be forced, as a condition of serving individuals in the Disabilities Program, to financially support the SEIU or AFSCME as their state-designated representative for the purposes of speaking to, petitioning, and otherwise lobbying the State and its officials with respect to limited aspects of the Disabilities Program, as this is the principal purpose of the scheme.

35. Plaintiffs Pamela Harris, Gordon Steifel, and Ellen Bronfeld devoted time and money to campaign against SEIU Local 73 and AFSCME in the mail ballot election. For example, Plaintiff Harris alone spent $1,342.02 for this purpose.

36. SEIU Local 73 and AFSCME lost the mail ballot election that concluded on 19 October 2009. However, under EO 2009-15, the SEIU and AFSCME can request another election, or become the state-designated representative of Providers without an election after they collect a sufficient number of cards from Providers. On information and belief, the SEIU and AFSCME are continuing their efforts to impose themselves on Providers under EO 2009-15.

37. Plaintiffs Pamela Harris, Ellen Bronfeld, Carole Gulo, Michelle Harris, Wendy Partridge, Gordon P.

Stiefel, and Patricia Withers are subject to an actual and ongoing threat of being compelled both to support the SEIU and AFSCME as their state-designated representative for the purposes of speaking to, petitioning, and otherwise lobbying the State and its officials, and to having to expend time and money to prevent this infringement on their Constitutional rights.

CLASS ALLEGATIONS

38. This is a class action brought by named Plaintiffs Theresa Riffey, Susan Watts, and Stephanie Yencer-Price for themselves and all others similarly situated, pursuant to Federal Rule of Civil Procedure 23(b)(1)(A), (b)(2), and/or 23(b)(3). The class consists of all individuals who: (1) are Personal Assistants in the Rehabilitation Program; and, (2) have had any union dues or fees deducted from the monies paid to them for caring for participants in the Rehabilitation Program and remitted to SEIU Healthcare Illinois & Indiana and its affiliates. The class includes everyone who comes within the class definition at any time from two years prior to the commencement of this action until the conclusion of this action.

39. The number of persons in the class exceeds 20,000. Their number makes joinder of the entire class impractical.

40. There are questions of fact and law common to all class members. Factually, all class members are being compelled to support SEIU Healthcare Illinois & Indiana as their state-designated representative for the purposes of speaking to, petitioning, and otherwise lobbying the State and its officials with respect to limited aspects of the Rehabilitation Program. The

question of law is the same for all class members: does this violate their rights under the United States Constitution?

41. The claims of Plaintiffs' Theresa Riffey, Susan Watts, and Stephanie Yencer-Price are typical of other members of the class, in that their Constitutional rights are all being infringed upon in a similar manner by being compelled to support SEIU Healthcare Illinois & Indiana as their state-designated representative for the purposes of speaking to, petitioning, and otherwise lobbying the State and its officials with respect to limited aspects of the Rehabilitation Program.

42. Plaintiffs' Theresa Riffey, Susan Watts, and Stephanie Yencer-Price can adequately represent the interests of the class. They have no interests antagonistic to the class, all of whom have a cognizable interest in not being compelled to support a state-designated lobbyist in violation of their Constitutional rights. Plaintiffs' attorneys are provided pro bono by a well-established legal-aid organization and are experienced in representing individuals whose constitutional rights are infringed upon when compelled to support a union.

43. A class action can be maintained under Rule 23(b)(1)(A), because separate actions by class members will create a risk of inconsistent adjudications that would establish incompatible standards of conduct for the Defendants with respect to whether it is lawful to compel Personal Assistants to support SEIU Healthcare Illinois & Indiana.

44. A class action can be maintained under Rule 23(b)(1)(B) because an adjudication that determines

whether it is constitutional to compel a class member to support the SEIU Healthcare Illinois & Indiana will, as a practical matter, be dispositive of the interests of other class members.

45. A class action can be maintained under Rule 23(b)(3), because the common questions of law and fact identified in paragraph 40 of the Complaint predominate over any questions affecting only individual class members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy because, among other things, all class members are suffering the same violation of their Constitutional rights, but the amount of money involved in each individual's claim would make it burdensome for class members to maintain separate actions.

CLAIMS FOR RELIEF

COUNT I

(Violation of Rights of Personal Assistants under 42 U.S.C. § 1983 and the United States Constitution)

Plaintiffs reassert the foregoing and further allege:

46. By compelling Personal Assistants in the Rehabilitation Program, specifically Plaintiffs Theresa Riffey, Susan Watts, Stephanie Yencer-Price, and members of the Plaintiff class, to support SEIU Healthcare Illinois & Indiana and its affiliates as their state-designated representative for the purposes of speaking to, petitioning, and otherwise lobbying the State and its officials with respect to limited aspects of the Rehabilitation Program, Defendants

(other than AFSCME) are abridging and violating the rights of Personal Assistants to freedom of association, freedom of speech, and to petition the government for redress of grievances under the First Amendment to the United States Constitution, in violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

47. Unless enjoined by this Court, Plaintiffs Theresa Riffey, Susan Watts, Stephanie Yencer-Price, and members of the Plaintiff class will continue to suffer irreparable harm, damage, and injury for which there is no adequate remedy at law.

COUNT II

(Threatened Violation of Rights of Providers under 42 U.S.C. § 1983 and the United States Constitution)

Plaintiffs reassert the foregoing and further allege:

48. By threatening to compel Plaintiffs Pamela Harris, Ellen Bronfeld, Carole Gulo, Michelle Harris, Wendy Partridge, Gordon Stiefel, and Patricia Withers to support the SEIU or AFSCME as their state-designated representative for the purposes of speaking to, petitioning, and otherwise lobbying the State and its officials with respect to limited aspects of the Disabilities Program, Defendants are threatening to abridge and violate their rights to freedom of association, freedom of speech, and to petition the government for redress of grievances under the First Amendment to the United States Constitution, in violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

49. Plaintiffs Pamela J. Harris, Ellen Bronfeld, Carole Gulo, Michelle Harris, Wendy Partridge, Gordon P. Stiefel, and Patricia Withers are subject to an actual and ongoing threat of irreparable harm and injury, for which there is no adequate remedy at law, that is inherent in a violation of their Constitutional rights.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request that this Court do the following:

A. Issue a permanent injunction that:

(1) enjoins Defendants from compelling or otherwise causing Personal Assistants and Providers to support the SEIU, AFSCME, or any other representative designated by the State;

(2) enjoins enforcement of Public Act 93-0204, EO 2003-08, and EO 2009-15 for the purpose of compelling or causing Personal Assistants or Providers to support the SEIU, AFSCME, or any other representative designated by the State;

(3) voids and rescinds Section 6 of Article X of the Agreement referenced in paragraph 25 of the Complaint;

B. Issue declaratory judgments that:

(1) it is unconstitutional to compel Personal Assistants and Providers to support the SEIU, AFSCME, or any other representative designated by the State;

(2) Public Act 93-0204, EO 2003-08, and EO 2009-15 are unconstitutional to the extent that they authorize or permit the State of Illinois, and any entity

acting in conjunction with the State, to compel or cause Personal Assistants and Providers to support the SEIU, AFSCME, or any other representative designated by the State.

C. Award monetary damages to:

(1) Plaintiffs Theresa Riffey, Susan Watts, Stephanie Yencer-Price and each member of the Plaintiff Class in an amount equal to the union fees taken from the monies owed to them for caring for participants in the Rehabilitation Program and remitted to SEIU Healthcare Illinois & Indiana and of its affiliates, with interest, and hold the SEIU liable for said damages;

(2) Plaintiffs Pamela Harris, Ellen Bronfeld, Carole Gulo, Michelle Harris, Wendy Partridge, Gordon Stiefel, and Patricia Withers for any monies that they spent, or spend in the future, to prevent the imposition of the SEIU or AFSCME as their representative under EO 2009-15 or similar provisions, with interest, and hold the SEIU and AFSCME jointly and severally liable for said damages.

D. Award nominal damages to each Plaintiff and member of the Plaintiff Class.

E. Award Plaintiffs their costs and reasonable attorneys' fees, pursuant to the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988.

F. Grant such other and additional relief as the Court may deem just and proper.

Dated this 22nd day of April 2010.

/s/ William L. Messenger
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EXHIBIT C –DIST. CT. DOCKET # 32-4 (6/15/10)

Collective Bargaining Agreement between SEIU Healthcare Illinois & Indiana and Illinois Dep't Of Central Management Services Covering the Illinois Department of Human Services / Office of Rehabilitation Services

From January 1, 2008, to June 30, 2012

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PREAMBLE

This agreement (hereinafter referred to as the "Agreement") has been made and entered into by and between the State of Illinois, Departments of Central Management Services and Human Services (hereinafter referred to as the "State") and the Service Employees international Union, Local 880 and its successor in interest (hereinafter referred to as the "Union"). The Union and the State recognize the unique employment arrangement of Personal Assistants (hereinafter referred to as "Personal Assistants") and Customers (hereafter referred to as "Customers") receiving services in the Department of Human Services, Office of Rehabilitation Services, Home Services Program (hereafter referred to as the "Home Services Program or HSP"), nor will this Agreement in any way diminish the Customers' control over the hiring, in-home supervision, and termination of Personal Assistants within the limits set by the Home Services Program, Personal Assistants arc not State employees for purposes of eligibility to receive statutorily mandated benefits, including but not limited to, retirement and health insurance.

DEFINITION OF TERMS

The following terms shall be interpreted as indicated below when used in this Agreement:

a) "State" refers to the Director of Central Management Services, Secretary of the Department of Human Services, or their representatives collectively or singly, as the context may require.

b) "Customer" refers to anyone who has been referred to the Home Services Program for a determi-

nation of eligibility for services; has applied for services through the Home Services Program; is receiving services through the Home Services Program; or has received services through the Home Services Program.

c) "Personal Assistant" refers to an individual hired by a Customer who may perform household tasks, shopping or personal care; incidental health care tasks which do not require independent judgment, with the permission of the Customer's physician, Customer, and/or family; and monitoring to ensure the health and safety of the Customer.

d) "Union" refers to Service Employees International Union, Local 880 and its successor in interest.

ARTICLE I. UNION RECOGNITION

Section 1. Union Recognition

The State recognizes SEIU, Local 880 and its successor in interest, as the sole and exclusive bargaining representative of all Personal Assistants.

Section 2. Integrity of the Bargaining Unit

The State recognizes the integrity of the bargaining unit and will not take any action intended to erode it. Subject to the provisions of this Agreement, the State will continue to endeavor to assign bargaining unit work to bargaining unit employees. No action taken by the Customer shall be considered erosion of the bargaining unit.

ARTICLE II. NON-DISCRIMINATION

The State agrees not to discriminate against any Personal Assistant on the basis of race, sex, sexual orientation, creed, religion, color, marital or parental

status, age, national origin, political affiliation and/or beliefs, disability, or for other non-merit factors. Nothing in this section shall limit the rights of Customers as provided for in Article VI.

ARTICLE III. DIGNITY AND RESPECT

Personal Assistants, the State and the Union will treat each other with dignity and respect.

ARTICLE IV. UNION RIGHTS

Section 1. Union Exclusivity

The State shall not meet, discuss, confer, subsidize or negotiate with any other employee organization or its representatives on matters pertaining to all terms and conditions of employment of Personal Assistants working under the Home Services Program that are within the State's control. Nor shall the State negotiate with Personal Assistants over terms and conditions of employment within the State's control.

Section 2. Union Activity

The State agrees that no Personal Assistant shall be discriminated against, intimidated, restrained or coerced in or on account of the exercise of any rights granted by the Illinois Public Labor Relations Act or by this Agreement, on account of membership or non-membership in, or lawful activities on behalf of the Union.

Section 3. Neutrality

The State and its managerial and supervisory staff shall remain neutral on the question of whether Personal Assistants should join and be represented by the Union. All questions addressed to the State or its staff by Personal Assistants concerning membership

in or representation by the Union will be referred to the Union.

Section 4. Lists

In order to assist in the communication process, the State will provide a list of names, addresses, dates of birth, social security numbers, telephone numbers, date first paid under this Agreement, cumulative hours paid beginning with January 1, 1997, hours paid in the previous month, wage rate and zip codes of all Personal Assistants electronically on a monthly basis to the Union. The list will indicate whether or not the Personal Assistant is a member of the Union and will indicate the amount of Union dues or initiation fees deducted from the Personal Assistant's payment that month. The State will also send to the Union each month a list of Personal Assistants who began providing services during the previous month with the same information and in the same format as the full list described above.

Section 5. Union Orientation

The Union shall be permitted to conduct its orientation as part of an informational meeting for new Personal Assistants. The Personal Assistants' participation in such meeting shall be voluntary.

Section 6. Bulletin Boards

The Union shall be allowed to provide and maintain a reasonably sized bulletin board at each Rehabilitation Services Field Office. Items posted shall not be political, partisan or defamatory in nature.

Section 7. Notices

The State will provide to the Union a copy of any notice provided by the State to any Personal Assistant.

Section 8. Union Representatives

The Union shall notify the State of the names of its official representatives and changes in such representatives. The list and updates shall be sent to the Department of Central Management Services, Division of Employee and Labor Relations. The Union shall notify the Department of Human Services, Bureau of Labor Relations of the names of stewards selected by the Union at the beginning of the fiscal year. Stewards shall receive no compensation for time spent engaging in activities as a Steward. Union representatives shall have access to Department of Human Services facilities with prior approval of the Department of Human Services. Such approval shall not be unreasonably denied.

Section 9. Provision of Union Information to New Providers

When an individual initially becomes a Personal Assistant with the Home Services Program, the State shall include, in the packet of information and forms provided to all new Personal Assistants, materials prepared by the Union that fit into the Personal Assistant packet concerning union representation and union membership. The material shall not be political, partisan or defamatory in nature and shall be reviewed by the Home Services Program.

ARTICLE V. MANAGEMENT RIGHTS

Section 1. Rights Residing with the State

The State reserves exclusively all the inherent rights and authority to manage and operate its programs. The parties agree that all rights not specifically granted in this Agreement are reserved solely to the State and the State has the right to decide and implement its decisions regarding such rights without negotiating about the decision and/or effects of those decisions. Examples of the rights reserved solely to the State, its agents and officials include, but are not limited to, the right: to operate so as to carry out the statutory mandate of the State; to establish the State's missions, programs, objectives, activities and priorities; to plan, direct and control the use of resources, including all aspects of the budget, in order to achieve the State's missions, programs, objectives, activities and priorities; to manage, direct, and control all of the State's activities to deliver programs and services; to develop, modify and administer policies, procedures, rules and regulations and determine the methods and means by which operations are to be carried out; to make, extend, limit and execute contracts and all other instruments necessary or convenient for the performance of the State's duties or exercise of the State's powers, including contracts with public and private agencies, organizations, corporations or individuals; to determine the State's organization; to take whatever actions the State deems necessary to carry out services when the State determines an emergency; to maintain or modify any and all public operations and work requirements entrusted to the State to more efficiently and effectively provide services.

Section 2. Non-Waiver

The above enumerations of the State's rights are not inclusive and do not exclude other rights not specified including those duties, obligations or authority provided under law. The exercise or non-exercise of rights retained by the State shall not be construed to mean that any right of the State is waived.

ARTICLE VI. CUSTOMER RIGHTS

Section 1. Customer Rights

Customers have the sole and undisputed right to hire, and supervise the work of any Personal Assistant and to terminate without cause and without notice any Personal Assistant. Customers shall retain the right to direct services rendered by the Personal Assistant, train the Personal Assistant, and determine under what circumstances anyone may enter their homes. .

Section 2. Information Regarding Customers

The Union shall neither seek nor receive information from the State regarding the name, address, phone number or any other personal information regarding Customers. Union representatives and Personal Assistants shall maintain strict standards of confidentiality regarding Customers and shall not disclose personal information pertaining to Customers obtained from any source unless the disclosure is with the express written consent of the Customer or compelled by the legal process or otherwise required by law.

Section 3. Union Access

Union Representatives shall not conduct Union business, including business related to the enforcement of this Agreement, or contact in person or via telephone Personal Assistants at the home of the Customer, unless the Personal Assistant's primary residence is that of the Customer or the Personal Assistant has the written consent of the Customer to conduct Union business at their home.

Section 4. Non-Waiver

The above enumerations of the Customer's rights are not inclusive and do not exclude other rights not specified including those duties, obligations or authority provided under law. The exercise or non-exercise of rights retained by the Customer shall not be construed to mean that any right of the Customer is waived. No action taken by the Customer with respect to this Article shall be subject to the grievance procedure.

Section 5. Mediation between Customers and Personal Assistants

The parties mutually recognize that the State's best interests are served by maintaining good relations between the Customers and Personal Assistants. The State intends, where it deems appropriate, to mediate disputes between Customers and Personal Assistants.

ARTICLE VII. WAGES & SPECIAL FUNDS

Section 1. Wages

a) On July 1, 2008, the pay rates for all Personal Assistants shall be increased by $0.50 to $9.85 per hour.

b) On July 1, 2009, the pay rates for all Personal Assistants shall be increased by $0.60 to $10.45 per hour.

c) On July 1, 2010, the pay rates for all Personal Assistants shall be increased by $0.75 to $11.20 per hour.

d) On July 1, 2011, the pay rates for all Personal Assistants shall be increased by $0.35 to $11.55 per hour.

Section 2. Special Funds

a) Union Health Benefit Fund

i.) Intent

The Union and the State believe that the services provided by the Personal Assistants serve the public interest. The Union intends to provide access to health insurance coverage to eligible Personal Assistants.

ii.) Contribution and Administration

Effective July 1, 2008 through June 30, 2009, the State shall contribute a total of three million dollars ($3,000,000) in twelve (12) approximately equal monthly installments into a health Benefit Fund (the "Fund") selected or established by the Union.

Effective July 1, 2009 through June 30, 2010, the State shall contribute a total of eight million dollars ($8,000,000) in twelve (12) approximately equal monthly installments into the Fund.

Effective July 1, 2010 through June 30, 2011, the State shall contribute a total of ten million five hundred thousand dollars ($10,500,000) in twelve (12) approximately equal monthly installments into the Fund.

Effective July 1, 2011 through June 30, 2012, the State shall contribute a total of fifteen million five hundred thousand dollars ($15,500,000) in twelve (12) approximately equal monthly installments into the Fund.

The foregoing contributions shall be utilized for both providing benefits and administration of the Fund.

The Union has the unilateral and exclusive right and any attached responsibility to retain an insurance underwriter(s) of its choice, to self-inure, or to self-fund any benefit plan, to determine an insurance carrier to provide any potential benefits to individuals covered by this Agreement, or to participate in any new or established benefit plan. Other than as provided herein, the Union shall be solely responsible for payment and administration of such plan. The State reserves the right to audit the use of such funds.

iii.) Disclaimers

The terms and conditions of the Fund, including coverage and eligibility, are under the sole control of the Union. The State shall not be party to any disputes over benefit levels or claims for benefits made by

participants in the Fund. Such disputes will be resolved solely by the Union or the Fund Trustees, as appropriate.

This section shall not be subject to the grievance or arbitration procedures provided for in this Agreement.

The State's sole obligation under this Article shall be the payment of the amounts set forth in subsection ii) above. The failure of any carrier to provide benefits under any insurance program shall not result in any liability to the State. Further, the State shall have no diminished liability or additional liability to provide benefits due to its failure to make any payments to the Fund due to changes in Federal and/or State law.

b) Additional State Funding

In addition to the amounts set forth above in Sections 1 and 2, the State shall further pay an additional eighteen millions dollars ($18,000,000), according to the following schedule, which the Union in its sole discretion shall allocate between wages and other special funds:

Effective July 1, 2010 through June 30, 2011, nine million dollars ($9,000,000).

Effective July 1, 2011 through June 30, 2012, nine million dollars ($9,000,000).

The Union shall notify the State in writing no later than May 1, 2010 and May 1, 2011, or as soon as practicable thereafter, of its allocation of the above amounts. If and to the extent that the Union allocates any amount toward Health Insurance, the State shall pay such amounts in twelve (12) approx-

imately equal monthly installments as set forth in Section 2.ii.

ARTICLE VIII. LABOR/MANAGEMENT COMMITTEE MEETINGS

For the purpose of maintaining communications between labor and management in order to cooperatively discuss matters of mutual concern, the agency head and/or his/her designee shall meet, as may be reasonably necessary, with representatives of the Union. The parties shall exchange agendas and a list of anticipated attendees one (1) week prior to the scheduled meeting.

ARTICLE IX. HEALTH AND SAFETY

Section 1. Training, Health & Safety Committee

To enhance the services provided by Personal Assistants pursuant to the Home Services program, the State and the Union agree to establish a joint committee to explore increased training for Personal Assistants and study health and safety issues for Personal Assistants.

The State and SEIU agree to create a committee to develop a voluntary training plan, curricula, and compensable time for Personal Assistants, designed to improve the quality of care Personal Assistants are able to provide. Beginning July 1, 2011, the State agrees to provide $2.0 million for Personal Assistants' training. Any remaining unspent funds shall not be diverted to other uses under this Agreement.

Section 2. Gloves

When gloves are not available at the Customer's residence, a Personal Assistant may request and receive them from the State.

Section 3. Work-related Injury and Notification

In the event a Personal Assistant is injured while performing services for a Customer, the Personal Assistant shall notify the Home Services Program immediately. This obligation shall not affect the provision of benefits as set forth under the Illinois Workers' Compensation Act (820 ILCS 305/1 et. seq.), except as required by law.

ARTICLE X. PAYROLL/WITHOLDING

Section 1. Timely Payment

Paychecks shall be issued in a timely manner on a semi- monthly basis. Pay periods shall run from the first (1st) through the fifteenth (15th) and the sixteenth (16th) through the last day of the month. Personal Assistants must submit their time sheets (calendars) within five (5) state workdays after the end of the pay period in order to ensure timely payment. The Customer's signature (or that of the authorized signatory or the Power of Attorney) must be on the time sheet in order to be processed for payment.

Section 2. Direct Deposit

Each Personal Assistant shall have the right and shall be encouraged to have his/her paycheck issued via Direct Deposit. It is the responsibility of each Personal Assistant to notify the Home Services Program of any changes to their account.

Section 3. Payroll Tax Withholding

The State, as pay agent, and consistent with the authorization from the IRS or other appropriate taxing authority, will deduct all applicable Federal, State, and local taxes from the check of any Personal Assistant, as required by law and/or where the Personal Assistant completes and returns to the State the appropriate forms from the taxing authority. These deductions shall begin within the time required by law, or, where there is no legal requirement, within 30 days following the request. Each new Personal Assistant and returning Personal Assistants who have not provided services during the past 24 months shall submit a new Federal W-4 Employee Withholding Allowance Certificate and a new Illinois W-4 Employee's Illinois Withholding Allowance Certificate prior to submitting their first time schedule for payment.

Section 4. Accurate Payment

Personal Assistants are entitled to receive accurate payment for services authorized and rendered. To promote an accurate payroll system, the State and the Union shall work together to identify causes of and solutions to problems resulting in late, lost or inaccurate paychecks and similar issues.

Section 5. Payroll Deductions

a) Upon receipt by the State, as pay agent and in conformance with applicable State and Federal laws and regulations, of written authorization from the Personal Assistant, union dues and initiation fees shall be deducted from the Personal Assistant's wages and remitted to the Union. The Union shall advise

the State of any increases in dues or other approved deductions in writing at least fifteen (15) days prior to its effective date. The State shall continue to make such deductions, except where the authorization is revoked by the Personal Assistant.

b) Upon receipt by the State of written authorization (supplied by the Union) from the Personal Assistants, contributions to PowerPAC, or entities for which payments could be authorized pursuant to the Section 4 of the State Salary and Annuity Withholding Act (5 ILCS 365/1 et seq.), in an amount specified by the Personal Assistant on the authorization card shall be deducted by the State, as pay agent, from payments made to the Personal Assistant and remitted to the designated entity. The State, as pay agent, shall continue to make such deductions, except where the authorization is revoked by the Personal Assistant.

c) A Personal Assistant who has previously authorized payroll deductions pursuant to prior agreements between the State and the Union shall continue to have such deductions made and shall not be required to re-authorize such deductions unless the Personal Assistant has specifically authorized revocation of deductions or the Personal Assistant has been off the payroll for two (2) years.

Section 6. Fair Share

Effective on the pay period beginning November 1, 2003, all Personal Assistants who are not members of the Union shall be required to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of

employment, but not to exceed the amount of dues uniformly required of members. The Union shall certify the Personal Assistants' monthly proportionate share to the State and the State shall deduct said amount from the wages of the Personal Assistants and remit it to the Union. The Union shall indemnify, defend, and hold the State harmless against any claim, demand, suit or liability arising from any action taken by the State in complying with this section.

Section 7. Revocation

All Personal Assistants covered by this Agreement who have signed Union dues checkoff cards prior to the effective date of this Agreement or who signed such cards after such date shall only be allowed to cancel such dues deduction within the prescribed procedures of the Comptroller. Any revocation card shall be sent directly to the Department of Human Services, Bureau of Labor Relations. The State will promptly send copies to the Union of signed revocation cards for each Personal Assistant who revokes his/her Union membership.

ARTICLE XI. GRIEVANCE PROCEDURE

Section 1. Definition

A. A grievance shall mean a dispute regarding the meaning or implementation of a specific provision of this Agreement brought by the Union or a Personal Assistant. Neither the Union nor the Personal Assistant can grieve the hiring or termination of the Personal Assistant, reduction in the number of hours worked by the Personal Assistant or assigned to the Customer, and/or any action taken by the Customer.

B. Grievances may be processed by the Union on behalf of itself, a Personal Assistant, or a group of Personal Assistants. The Personal Assistant is entitled to Union representation at each and every step of the grievance procedure and the Union shall have the right to have the grievant or grievants present at any step of the grievance procedure, if a meeting is held, and at arbitration. The resolution of a grievance filed on behalf of a group of Personal Assistants shall be made applicable to the appropriate employees within that group.

C. Both the Union and the State will work to resolve problems as quickly as possible and at the lowest possible step of the grievance procedure.

Section 2. Grievance Procedure

Participation in the grievance procedure in any capacity shall be done solely on the Personal Assistant's own time. Grievances must be filed with and received by the State within ten (10) calendar days from the date the Union or the Personal Assistant knew or should have known of the action or inaction that gave rise to the grievance.

Step 1: ORS Field Office

The grievance shall be reduced to writing and submitted to the ORS Field Office Supervisor or his/her designee. The Supervisor or his/her designee shall have ten (10) calendar days from receipt of the grievance to respond.

Step 2: Bureau Chief of the Home Services Program

If the grievance is not resolved at Step 1, the Union shall submit the grievance within seven (7) calendar days of the Step 1 response, or of the date such re-

sponse was due, to the Bureau Chief of the Home Services Program. The Bureau Chief or his/her designee shall have fourteen (14) calendar days to respond to the grievance.

Step 3: Department of Human Services, Bureau of Labor Relations.

If the grievance is not resolved at Step 2, the Union shall submit the grievance within seven (7) calendar days of the Step 2 response, or of the date such response was due, to the DHS Bureau Chief of Labor Relations. The Bureau Chief or his/her designee shall have twenty-one (21) calendar days to respond to the grievance.

Step 4A: Department of Central Management Services, Division of Employee and Labor Relations

If the grievance is not resolved at Step 3, the Union may submit the grievance within seven (7) calendar days of the Step 3 response, or of the date such response was due, to the CMS Division of Employee and Labor Relations. The Union's failure to move the grievance to Step 4A within the prescribed time limits will result in the grievance being resolved pursuant to the Step 3 decision. CMS shall have twenty-one (21) calendar days to respond to the grievance. In the event the parties are unable to reach a resolution, the Union may request in writing within fourteen (14) calendar days of the Step 4A response, or of the date such response was due, that the grievance be submitted to an independent arbitrator.

Step 4B: Arbitration

The parties shall jointly select an arbitrator according to mutually agreed rules. It shall be the duty of

the arbitrator to hear and consider evidence submitted by the parties and to thereafter make written findings of fact. The decision and award of the arbitrator shall be final and binding on all parties. The arbitrator shall have no authority to ignore, add, subtract or modify any of the terms and conditions of this Agreement. The arbitrator shall limit his/her decision solely to the application and interpretation of the relevant provisions of this Agreement. Questions of arbitrability shall be decided by the arbitrator prior to the arbitrator addressing the merits of the grievance. The expenses and fees of the arbitrator shall be paid by the losing party. In cases of split decisions the arbitrator shall determine what portion each party shall be billed for expenses and fees. The cost of the hearing rooms or verbatim records, if any, shalt be split by the parties. Each party shall bear the expenses of its own witnesses.

ARTICLE XII. GENERAL PROVISIONS

Section 1. Notification of Address

Personal Assistants shall notify the Home Services Program of any changes to their address of record. No address of record shall be the address of a Customer, unless it the primary residence of the Personal Assistant, or the Customer gives written consent.

Section 2. Publication of the Agreement

This Agreement shall be made available via the Department of Central Management Services' website.

Section 3. Employment Verification

Upon the request of a Personal Assistant, the State shall provide written verification of employment.

Section 4. Contracting Out

The State reserves the right to contract out any work it deems necessary or desirable because of greater efficiency, economy or other related factors. If, during the term of this Agreement, the State considers a policy that would result in a decrease of the percentage of services provided by Personal Assistants or an increase in the percentage of services provided by private agencies, it shall provide the Union with reasonable advance notice prior to taking any action to implement such a decision and shall thereafter, upon the Union's request, meet for the purpose of discussing the reason for its decision.

Section 5. No Strike/No Lockout

During the term of this Agreement, the Union, its members and representatives shall not engage in, authorize, sanction or support any strike, slowdown or other stoppage of work; nor shall the State during the term of this Agreement engage in any lockout.

Section 6. Discipline

Due to the unique employment arrangement of Personal Assistants and Customers, the Customers have the sole right to supervise, terminate and/or discipline Personal Assistants. In cases where it is necessary to protect the health, welfare or safety of a Customer, to include but not limited to, credible allegations of abuse, neglect or financial exploitation of a Customer by a Personal Assistant, the State reserves the right to condition any future funding based on credible allegations concerning Customer welfare or safety. Any such condition may include restriction of the employment of a particular Personal Assistant or

monitoring of services provided by a Personal Assistant. No such action shall be considered discipline that is subject to the grievance procedure or the requirement of an administrative hearing.

Section 7. Changes in Hours

Whenever the Customer suffers a reduction in hours or obtains an increase in hours, the, State will so inform the Customer's Personal Assistant(s) prior to implementing the change.

ARTICLE XII. TERM OF THE AGREEMENT

Section 1. Entire Agreement

This Agreement constitutes the complete and entire agreement between the parties, and concludes collective bargaining between the parties for its terms. The State and Union, for the duration of this Agreement, each waives the right and each agrees that the other shall not be obligated to bargain with respect to any subject matter referred to or covered in this Agreement. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreement arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.

Section 2. Severability

Should any part of this Agreement or any provisions contained herein be judicially determined to be contrary to law, such invalidation of such part or provision shall not invalidate the remaining portions

hereof and they shall remain in full force and effect. In such event, upon the request of either party, the parties shall meet promptly and negotiate with respect to substitute provisions for those provisions rendered or declared unlawful, invalid or unenforceable.

Section 3. Term of the Agreement

This Agreement shall be effective January 1, 2008, and shall remain in full force and effect through June 30, 2012. Thereafter, it shall automatically renew itself from year to year unless at least one hundred and twenty (120) days notice prior to termination, either party serves notice, in writing, of its intent to amend, add to, subtract from, or terminate this Agreement.

For the State	For the Union
Date: _____	Date: _____
[Signatures Omitted]	[Signatures Omitted]

SIDE LETTER

No later than January 1, 2009, the State and the Union shall establish a Joint Personal Assistant Registry Committee for the purpose of creating a Personal Assistant Referral Registry no later than January 1, 2010. The Joint Committee shall consist of up to six (6) representatives of the State and six (6) representatives of the Union. The parties are encouraged to select members who are representative of Customers' interests. The intention of the registry would be to provide Customers, in cases where the Customer does not already have a preferred candidate (or is in

need of a backup Personal Assistant and does not already have a preferred candidate), a voluntary resource in finding a Personal Assistant. In the event the Committee does not reach a consensus on the design and substance of the registry, the State shall nevertheless implement a registry. A Personal Assistant's participation in the registry shall be voluntary. The registry would be a supplemental, optional resource. The Registry shall not be construed to be an endorsement of any Personal Assistant and it shall preserve the confidentiality of the Personal Assistants and Customers.

For the State	For the Union
Date: _____	Date: _____
[Signatures Omitted]	[Signatures Omitted]

AGREEMENT

This Agreement is made by and between the State of Illinois, the Departments of Central Management Services and Human Services (collectively, the "State"), and Service Employees International Union Local 880 and its successor in interest (collectively, the "Union").

The State and the Union agree to take all necessary and lawful steps to include under the parties' Personal Assistants labor agreement those persons providing Maintenance Home Health (MHH) Services under the Home Services Program of the Division of Rehabilitation Services, Department of Human Services. No other rights are conferred or implied. The parties mutually intend that the State voluntarily recognize the Union as the exclusive col-

lective bargaining representative of such persons. The necessary and lawful steps to be undertaken will include administrative action, Executive Order and/or legislation.

The State and Union further agree to establish a Joint Committee to implement this agreement and determine adjustments to MHH compensation so as to improve it and make it regular and rational throughout the state within the following annual funding maximums:

Effective July 1, 2008, an additional amount not to exceed one million dollars ($1 million) in annual funding over the prior 12-month period. Effective July 1, 2009, an additional amount not to exceed one million dollars ($1 million) in annual funding over the prior 12-month period (for an aggregate increase of $2 million over two years).

Effective July 1, 2010, an additional amount not to exceed one and one-half million dollars ($1.5 million) in annual funding over the prior 12-month period (for an aggregate increase of $3.5 million over three years).

Effective July 1, 2011, an additional amount not to exceed one and one-half million dollars ($1.5 million) in annual funding over the prior 12-month period (for an aggregate increase of $5 million over four years).

This agreement shall be implemented only to the extent permitted by law.

AGREED:

Service Employees international Union, Local 880

State of Illinois, Departments of Central Management Services and Human Services

For the State	For the Union
Date: _____	Date: _____
[Signatures Omitted]	[Signatures Omitted]

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 22 2013
OFFICE OF THE CLERK

No. 11-681

IN THE
Supreme Court of the United States

PAMELA HARRIS *et al.*,
Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

This case concerns two Medicaid-waiver programs run by the State of Illinois: the "Rehabilitation Program" and the "Disabilities Program." Under both, the State subsidizes the costs of homecare services offered to qualifying participants. Illinois has implemented several laws calling for the designation of an "exclusive representative" for the providers of homecare services, that is, a union. Rehabilitation Program providers must also pay compulsory fees to their state-designated representative. The State has not yet designated an exclusive representative for the Disabilities Program providers.

The questions presented in this case are:

1. Whether a State may, consistent with the First and Fourteenth Amendments to the Constitution, compel homecare providers to accept and financially support a private organization as their exclusive representative to petition the State for greater reimbursements from its Medicaid programs?

2. Whether homecare providers may challenge a law that permits the State to compel them to associate with a union before the State has designated the particular union that will represent them?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the U.S. Court of Appeals for the Seventh Circuit were:

1. Pamela Harris, Ellen Bronfeld, Carole Gulo, Michelle Harris, Wendy Partridge, Theresa Riffey, Stephanie Yencer-Price, Susan Watts, and Patricia Withers, plaintiffs-appellants below and all of whom, except Ellen Bronfeld, are petitioners on review; and

2. Pat Quinn, in his official capacity as Governor of the State of Illinois, Service Employees International Union (SEIU) Healthcare Illinois & Indiana, SEIU Local 73, and American Federation of State, County, and Municipal Employees (AFSCME) Council 31, defendants-appellees below and respondents on review.

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IN THE

Supreme Court of the United States

No. 11-681

PAMELA HARRIS *et al.*,
Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 656 F.3d 692 and is reprinted in the appendix to the Petition for Certiorari (Pet. App.) at 1a-17a. The opinion of the U.S. District Court for the Northern District of Illinois is not reported, but is available at 2010 WL 4736500, and is reprinted at Pet. App. 18a-39a.

JURISDICTION

The Seventh Circuit's judgment was entered on September 1, 2011. A timely petition for certiorari was filed on November 29, 2011, and granted on October 1, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent state statutes are:

- Illinois Public Act 93-204 (2003), relevant provisions reprinted at Pet. App. 40a-44a;
- Illinois Public Labor Relations Act, 5 Ill. Comp. Stat. 315/1 *et seq.*, relevant provisions reprinted in the addendum;
- Illinois Disabled Persons Rehabilitation Act, 20 Ill. Comp. Stat. 2405/0.01 *et seq.*, relevant provisions reprinted in the addendum; and
- Illinois Developmental Disability and Mental Disability Services Act, 405 Ill. Comp. Stat. 80/0.01 *et seq.*, relevant provisions reprinted in the addendum.

Two state executive orders (EOs) are also at issue. They are EO 2003-08, reprinted at Pet. App. 45a-47a, and EO 2009-15, reprinted at Pet. App. 48a-51a.

INTRODUCTION

This case implicates two rights at the core of the First Amendment: the "[f]reedom of association," *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), and the freedom to "petition the Government for a redress of grievances," U.S. Const. amend. I. Illinois law trammels both rights by requiring individuals who provide in-home care to Medicaid recipi-

ents to accept and financially support a union as their exclusive representative for petitioning the State over its Medicaid rates and policies.

For the State to impose mandatory representation on Medicaid providers, it must show "a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2289 (2012) (5-4 decision) (quoting *Roberts*, 468 U.S. at 623). The State does not come close; its justification for compelled association is entirely circular, relying on the need to compel speech—i.e., "feedback" from providers—to justify the law.

The Seventh Circuit, however, concluded that the providers could be unionized under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (6-3 decision), because it saw them as jointly employed by the State under common-law principles. *Abood* held that public employees could be compelled to support an exclusive representative to facilitate "labor peace," i.e., to avoid workplace disruptions caused by employee support for rival unions, and to prevent employees from "free-rid[ing]" on union representation. *Id.* at 224. *Abood* borrowed these rationales from private sector cases—which had identified them as sufficient to justify Congress' exercise of Commerce Clause powers—and transformed the rationales into a compelling government interest justifying the infringement of public employees' First Amendment associational rights. *Id.* at 220-24.

Concurring only in the judgment, Justice Powell explained why the *Abood* Court's expansion of the "labor peace" rationale ran contrary to basic First Amendment principles. Justice Powell was correct. *Abood* is an errant exception to the "general rule"

that "individuals should not be compelled to subsidize private groups or private speech," *Knox*, 132 S. Ct. at 2295, and is one of this Court's "prior decisions" that "cross[es] the limit of what the First Amendment can tolerate," *id.* at 2291.

At the very least, *Abood* should be limited to its facts. The "labor peace" rationale for permitting the government to compel individuals to accept a representative for petitioning government should be accepted only when (1) the affected individuals are being directly and actively managed and supervised by the government in its workplaces, and (2) the representation does not involve matters of public concern.

That test is not met here. Petitioners work in private homes. They are supervised by participants in Medicaid programs, not the State. And Petitioners are being forced to accept and support representation on matters of public concern; namely, the State's policies governing the distribution of public benefits through Medicaid-funded programs. Illinois has no compelling interest in infringing Petitioners' rights in this manner. Illinois' exclusive-representation laws targeted at homecare providers therefore violate the First Amendment. The Seventh Circuit's decision should be reversed.

STATEMENT

A. Medicaid Homecare Providers in Illinois

1. Petitioners are eight caregivers who provide in-home services to disabled individuals in Illinois. Joint Appendix (J.A.) 16-18. All but one care for a disabled family member. J.A. 16-18. Several provide this care within their own homes.

Three petitioners—Theresa Riffey, Susan Watts, and Stephanie Yencer-Price—serve or served as

"personal assistants" under Illinois' Home Services Program, known as the "Rehabilitation Program."[1] J.A. 17-18. Participants in this program are those who would otherwise face institutionalization due to severe medical impairments; the purpose is "to provide for rehabilitation, habilitation[,] and other services to persons with one or more disabilities, their families[,] and the community." 20 Ill. Comp. Stat. 2405/1. Susan Watts, for example, provides homecare services for her daughter, Elizabeth, who requires constant care and supervision due to quadriplegic cerebral palsy, a stroke, and numerous surgeries. J.A. 18.

The remaining five petitioners—Pamela Harris, Michelle Harris, Carole Gulo, Wendy Partridge, and Patricia Withers—provide homecare for family members under Illinois' Home-Based Support Services Program, known as the "Disabilities Program."[2] J.A. 17-18. This program provides "alternatives to institutionalization . . . to permit mentally disabled adults to remain in their own homes." 405 Ill. Comp. Stat. 80/2-2. For example, Pamela Harris provides homecare services for her son Joshua, who suffers from a rare genetic syndrome that adversely affects his cognitive abilities and muscular and skeletal systems, and causes severe intellectual and developmental disabilities. J.A. 17.

2. Both the Rehabilitation Program and the Disabilities Program are Medicaid-waiver programs. J.A. 19, 20; *see* 42 U.S.C. § 1396n(c). The federal Medicaid

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[1] *See* 20 Ill. Comp. Stat. 2405 *et seq.*; Ill. Admin. Code tit. 89, parts 676-88.

[2] *See* 405 Ill. Comp. Stat. 80 *et seq.*; Ill. Admin. Code tit. 59, part 117.

program partially funds state programs that, among other things, enable persons with disabilities to live in their homes instead of institutions. *See* Janet O'Keeffe *et al.*, U.S. Dep't of Health & Human Servs., *Understanding Medicaid Home & Community Services: A Primer* (2010) (hereinafter *Medicaid Primer*).[3] In the wake of *Olmstead v. L.C.*, 527 U.S. 581 (1999), which held that persons with disabilities have a statutory right to be placed in community settings rather than institutions if feasible, there was a marked increase in the number and scale of these homecare programs. *Medicaid Primer*, 13-14, 22. As of 2008, 48 states operated 314 homecare programs pursuant to a Medicaid-waiver, *id.* at 29, and 36 states provided similar services under traditional Medicaid plans, *id.* at 27.

Under Illinois' Rehabilitation Program, people like Susan Watts may serve as a personal assistant to their severely disabled relatives—in Susan's case, Elizabeth, her daughter. Illinois defines "personal assistant," or "PA," as "an individual employed by the customer to provide . . . varied services that have been approved by the customer's physician." Ill. Admin. Code tit. 89, § 676.30(p). The "customer" is the program participant or her guardian, who "shall serve as the employer of the PA." *Id.* § 676.30(b). The "customer is responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating, and otherwise supervising the work performed by the PA, imposing . . . disciplinary action against

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[3] http://aspe.hhs.gov/daltcp/reports/2010/primer10.pdf (last visited Nov. 20, 2013).

the PA, and terminating the employment relationship between the customer and the PA." *Id.*; *see also id.* § 684.20(b) (explaining that as long as a PA meets the minimum requirements, the "customer has complete discretion in which Personal Assistant he/she wishes to hire").

The Rehabilitation Program pays for those services deemed necessary in a physician-approved service plan, subject to a monthly costs cap. *Id.* §§ 679.50, 684.10. The State's role in the Rehabilitation Program is quite limited: "Although DHS [(the Department of Human Services)] shall be responsible for ensuring that the funds available under the [Program] are administered in accordance with all applicable laws, DHS shall not have control or input in the employment relationship between the customer and the personal assistants." *Id.* § 676.10(c).

The Disabilities Program operates similarly. This program supports homecare for mentally disabled persons—for example, it assists Pamela Harris in providing homecare for her son, Joshua. Participants may use part or all of their subsidy to hire individuals to provide personal care and certain health services in their home. J.A. 21. DHS pays for in-home services to the extent the service plan permits. *See* 405 Ill. Comp. Stat. 80/2-6; Ill. Admin. Code tit. 59, §§ 117.100-240. The maximum subsidy that a participant can receive is set by statute as a percentage of a participant's social security payments. *See* 405 Ill. Comp. Stat. 80/2-6. As with the Rehabilitation Program, the State's role in the Disabilities Program is limited: "Individuals and their families or legal guardians shall select the needed supports and services." Ill. Admin. Code tit. 59, § 117.115(a).

3. Many Medicaid-funded homecare programs are "self-directed," meaning that participants, or their guardians, are actively involved in developing their plans of care, and exercise "employer authority" to recruit, select, hire, supervise, and otherwise manage their caregivers. *Medicaid Primer*, 178-82; Robert Wood Johnson Foundation, *Developing and Implementing Self-Direction Programs and Policies: A Handbook*, 1-1 to 1-11, 2-3 to 2-5 (May 4, 2010) (hereinafter, *Self-Direction Handbook*).[4] Here, both the Rehabilitation and Disabilities Programs allow participants (or their guardians) to direct their own care. *See* Illinois DHS, *Home Services Program*;[5] Illinois DHS, *Division of Developmental Disabilities Waiver Manual: V. Self-Directed Services and Individual Budgeting*.[6] Accordingly, caregivers in these programs are understood to be employees of the *participants*—not the State. *See* pp. 6-7, *supra*.

In 1985, the Illinois State Labor Relations Board (ILRB) held just that. *See In re Ill. Dep't of Cent. Mgmt. Servs. & Rehab. Servs., & SEIU* No. S-RC-115, 2 PERI P 2007 (1985), *superseded by* 2003 Ill. Legis. Serv. 93-204. The Board found that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction

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[4] http://www.bc.edu/content/dam/files/schools/gsasw_sites/nrcpds/cc-full.pdf (last visited Nov. 20, 2013).

[5] http://www.dhs.state.il.us/page.aspx?item=36737 (last visited Nov. 8, 2013).

[6] http://www.dhs.state.il.us/page.aspx?item=52804 (last visited Nov. 8, 2013).

and control of private third parties (service recipients)." *Id.* at *2.

B. Exclusive Representation for Providers

1. This all changed in March 2003 when former Illinois Governor Rod Blagojevich issued EO 2003-08. This executive order acknowledged the ILRB's 1985 decision that "personal assistants are in a 'unique' employment relationship and that the State was not 'their "employer" or, at least, their sole employer.'" Pet. App. 45a. Nevertheless, Governor Blagojevich called for State recognition of a union to be the "exclusive representative" of personal assistants vis-à-vis the State. Pet. App. 46a. He reasoned that this representation was necessary "for the State to receive feedback from personal assistants in order to effectively and efficiently deliver home services," and that absent an exclusive representative, PAs purportedly "cannot effectively voice their concerns about the organization of the Home Services Program, their role in the program, or the terms and conditions of their employment under the Program." Pet. App. 46a.

In July 2003, the legislature codified that executive order by amending the Illinois Public Labor Relations Act. Pet. App. 40a-44a (Ill. Pub. Act 93-204, hereinafter, the "2003 Act"). The 2003 Act recognized what has always existed under the Rehabilitation Program: "the right of the persons receiving services . . . to hire and fire . . . personal assistants or supervise them within the limitations set by the Home Services Program." Pet. App. 44a (amending 20 Ill. Comp. Stat. 2405/3(f)). Nevertheless, the Act declared personal assistants delivering Medicaid-reimbursable services under the Rehabilitation Pro-

gram to be "public employees" of the State "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act." Pet. App. 43a. The 2003 Act emphasized that personal assistants were *not* State employees *for any other purpose*, "including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." Pet. App. 44a; *see also* Pet. App. 41a (similarly amending the definition of "public employee" in 5 Ill. Comp. Stat. 315/3(n)).

The State designated SEIU Healthcare Illinois & Indiana (SEIU-HII or the Union) to be the exclusive representative of Rehabilitation Program personal assistants for petitioning State officials about the Medicaid program's reimbursement rates and related policies. J.A. 23; *see* Pet. App. 43a (amending 5 Ill. Comp. Stat. 315/7); 5 Ill. Comp. Stat. 315/3(f) (defining "exclusive representative"). Illinois then entered into contracts with SEIU-HII that, among other things, require all personal assistants to pay Union fees. J.A. 24-25 (Art. X, § 6).[7] These so called "fair-use" fees are deducted directly from the personal assistants' Medicaid payments. *Id.* Consequently, each year more than 20,000 Illinois personal assistants are forced to pay the Union more than $3.6 million in fees. J.A. 25.

2. In June 2009, current Illinois Governor Pat Quinn issued EO 2009-15. It is almost identical to EO 2003-08, except that it targets providers in the Disabilities Program. *See* Pet. App. 48a-51a. It too calls for the designation of an "exclusive representative" for those providers and is similarly predicated

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[7] The agreement in place from January 1, 2008 to June 30, 2012 is reprinted at J.A. 35-60.

on the proposition that providers "cannot effectively voice their concerns . . . without representation." Pet. App. 49a. By its express terms, EO 2009-15 "is not intended to and will not in any way alter . . . the fact that individual providers are not state employees"—except that now, for purposes of petitioning the State concerning Medicaid reimbursement rates, they are declared to be such. Pet. App. 50a.

Despite Governor Quinn's support for mandatory representation, Disabilities Program providers defeated efforts by SEIU Local 73 and AFSCME Council 31 to become their representative in a mail-ballot election that concluded in October 2009. J.A. 27. But EO 2009-15 remains in effect, and Disabilities Program providers remain under threat of the State designating an organization to act as their exclusive representative before the State. J.A. 27-28.

3. Illinois continues to expand its definition of State employee to unionize more Medicaid providers. In January 2013, Governor Quinn signed into law Illinois Public Act 97-1158 (the 2013 Act). This statute targets "individual maintenance home health workers" who are reimbursed by the Rehabilitation Program and deems them "public employees"—but again, solely for purposes of unionization. 5 Ill. Comp. Stat. 315/3(n). Individuals now subject to mandatory representation include any "registered nurse" and "licensed-practical nurse" who provides in-home "direct health care services," and therapists who provide "in-home therapy, including the areas of physical, occupational and speech therapy." Ill. Admin. Code tit. 89, § 676.40(d).

Moreover, the 2013 Act applies to these Medicaid providers "no matter whether the State provides those services through direct fee-for-service ar-

rangements, with the assistance of a managed care organization or other intermediary, or otherwise." 5 Ill. Comp. Stat. 315/3(n). In other words, even individual providers who have employment or contracting relationships with private companies may be compelled to accept and financially support a union as their exclusive representative to the State.

C. Proceedings Below

In 2010, Petitioners ("Providers") filed a class action challenging both Illinois' requirement that Rehabilitation Program providers support an exclusive representative (the 2003 Act) and Governor Quinn's executive order authorizing the collectivization of Disabilities Program providers (EO 2009-15). J.A. 15-34 (Complaint). Providers assert that this "compulsory political representation . . . infringes on the fundamental rights of providers to free association, free speech, and to petition the government for a redress of grievances under the First Amendment." J.A. 16. They seek declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983. J.A. 16.

The district court dismissed the complaint. Pet. App. 39a. It dismissed the Rehabilitation Program Providers' claims under Fed. R. Civ. P. 12(b)(6), concluding that their First Amendment claim challenging the State's compelled representation was "unsound." Pet. App. 29a. The district court dismissed the Disabilities Program Providers' claims under Fed. R. Civ. P. 12(b)(1), finding them to be unripe and insufficient to establish standing. Pet. App. 39a.

Providers appealed. The Seventh Circuit affirmed on two grounds. Pet. App. 17a. First, it determined that this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), controlled because

the State was a "joint employer" of the Rehabilitation Program providers. Pet. App. 9a, 13a-14a. And because that was so, the court explained, the "labor peace" justification applied. Pet. App. 12a-13a. The court acknowledged, however, that it was "aware of no cases specifically discussing *Abood* in a joint-employment situation." Pet. App. 10a.

Second, the Seventh Circuit agreed with the district court that the claims of the Disabilities Program Providers were not ripe because they may never be unionized (although it disagreed that the claims should be dismissed with prejudice). Pet. App. 16a.

Providers then sought certiorari. While their petition was pending, this Court decided *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012). There, the Court reaffirmed that "mandatory associations are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 2289 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). The *Knox* Court also called into question—but did not resolve—whether, in the compelled-association context, "the Court's former cases have given adequate recognition to the critical First Amendment rights at stake." *Id.*

The Court granted the petition in October 2013.

SUMMARY OF ARGUMENT

The First Amendment guarantees all individuals the freedom to choose with whom they associate and the right to "petition the Government for a redress of grievances." U.S. Const. amend. I. Illinois arrogated these rights to itself when it forced Providers to accept and financially support an exclusive representa-

tive to petition the State about a public aid program in which Providers participate.

1. Mandatory associations receive "exacting First Amendment scrutiny," *Knox*, 132 S. Ct. at 2289, and may be sustained only if two criteria are met. First, the mandatory association must "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Roberts*, 468 U.S. at 623). "Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* (quoting *United States v. United Foods Inc.*, 533 U.S. 405, 414 (2001)).

Illinois' scheme satisfies neither test. It mandates association with a union without a compelling reason, purports to do so in the interest of obtaining greater "feedback" from providers even though less infringing means are readily available, and its compulsory union dues are not a necessary incident of any legitimate regulatory purpose.

The Seventh Circuit erred in holding that *Abood* controlled because providers could be deemed jointly employed by Illinois under common-law principles. *Abood* should be overturned. Its core rhetorical move—borrowing a "labor peace" concept from Commerce Clause jurisprudence and elevating it to a First Amendment "compelling interest"—was flawed then, as Justice Powell explained in his separate opinion, and it is flawed now. *Abood's* "free-rider" rationale for compulsory fees is also an "anomaly," and "generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289-90. *Abood* is in the category of prior Court decisions that "cross[ ] the

limit of what the First Amendment can tolerate," *id.* at 2291.

2. At the very least, *Abood* should be limited to its narrow facts and to true public employees. A government employer should be able to compel association with a union only when (a) the *government* is directly supervising the individuals in its workplaces, and (b) the representation does not involve matters of *public concern*. That test is not met here.

First, forcing providers to petition the State through a monopoly representative serves no compelling state interest. Illinois' homecare providers are not managed by the State. They do not work in State workplaces. The manner in which providers petition the State cannot disrupt any government workplace.

Second, when providers petition Illinois over its Medicaid programs, they act not as public servants speaking to their master, but as citizens petitioning their sovereign over a subject of public concern. Their expressive activity in this respect is no different from that of physicians, nurses, or hospitals seeking changes to a Medicaid program. The State has no legitimate interest in dictating the associations through which providers must petition it.

A contrary conclusion would have vast and damaging implications. If it were constitutional for Illinois to designate a compulsory advocate to speak for individuals because they provide services to Medicaid recipients, then states could impose compulsory advocates on many others whose services are funded by a government program—including, to name just a few, the medical industry and government contractors.

3. Finally, the homecare Providers who serve participants in Illinois' Disabilities Program are entitled

to challenge the State's regime. Those Providers need only show that Illinois' actions have created a substantial risk that they will be harmed. They did so, because EO 2009-15 substantially increases the risk that they will be forced to accept and support an exclusive representative. Because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 & n.29 (1976) (plurality opinion), the Disabilities Program Providers' claims are ripe.

For all of these reasons, the Seventh Circuit's decision should be reversed.

ARGUMENT

I. *ABOOD* SHOULD BE OVERRULED OR LIMITED TO WHERE GOVERNMENT DEMONSTRATES THAT EXCLUSIVE REPRESENTATION IS NECESSARY AND THE LEAST RESTRICTIVE MEANS TO PREVENT WORKPLACE DISRUPTION.

A. Mandatory Associations Must Be Justified by Compelling State Interests.

1. The First Amendment guarantees citizens the right to "petition the Government for a redress of grievances." U.S. Const. amend. I. This right "is generally concerned with expression directed to the government." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011). It is "among the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967), being implied by "[t]he very idea of a government, republican in form." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

The First Amendment also protects the "freedom to engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This includes a freedom to associate to petition the government. *See, e.g., Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937). As this Court has explained, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95 (1981).

Given that "'freedom of association . . . plainly presupposes a freedom not to associate,'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts*, 468 U.S. at 623), a state infringes on First Amendment rights when it compels association for an expressive purpose. 132 S. Ct. at 2289; *see, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). This includes when a state compels individuals to accept and support an exclusive union representative for dealing with government, as the purpose for this mandatory association is to "petition the Government for a redress of grievances" within the meaning of the First Amendment.

Just two terms ago, this Court reiterated that "compulsory [union] fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox*, 132 S. Ct. at 2298 (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 455 (1984)). The Court questioned "whether [its] former cases have given adequate recognition to the critical First Amendment rights at

stake." 132 S. Ct. at 2289. Although the Court did not then overrule any precedent, it emphasized that "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." *Id.* at 2291.

The Seventh Circuit failed to require the State to make this rigorous showing. Instead, it concluded that *Abood* could fairly be read to recognize a compelling government interest in "labor peace" whenever the government is involved in some aspects of the employment relationship. Pet. App. 10a. But *Abood* should not be read to relieve the State of its burden to demonstrate a compelling need for this mandatory association. And to the extent that the case stands for that proposition, it should be overruled.

B. *Abood* Should Be Overruled Because It Failed to Give Adequate Recognition to First Amendment Rights.

1. *Abood* involved a Michigan law that designated a union as the exclusive representative of teachers employed by the Detroit Board of Education. 431 U.S. at 211-12. The Court concluded that these teachers could be compelled to pay compulsory union fees because doing so promoted "labor peace"—a rationale that had previously justified compulsory union fees only in the private sector. As the *Abood* majority saw it, a mandatory-fee agreement was "constitutionally justified by the legislative assessment of the important contribution of the union . . . to the system of labor relations established by [the legislature]." *Id.* at 222.

For this proposition the Court relied on *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961). In both *Hanson* and *Street*, the Court considered the propriety of a section of the Railway Labor Act that allows private railroads to enter so-called "union shop" agreements. *Hanson* found that Congress had power under the Commerce Clause to enact this section, which provides that "notwithstanding the law of 'any State,' a carrier and a labor organization may make an agreement requiring all employees within a stated time to become a member of the labor organization." 351 U.S. at 228 (quoting 45 U.S.C. § 152 Eleventh). However, the First Amendment did not factor into that Commerce Clause decision. What little First Amendment analysis *Hanson* contained was quite abbreviated: the Court concluded that unconstitutional infringement of the "freedom of expression" was "not presented by this record." *Id.* at 238.

As for "labor peace"—the phrase that was to gain such pride of place years later in *Abood*—the *Hanson* Court only invoked the words "industrial peace" to explain Congress' Commerce Clause authority to invalidate state laws prohibiting union-shop agreements. *See id.* at 233. Reasoning that "the power of Congress to regulate labor relations in interstate industries is likewise well-established," and that "Congress has great latitude in choosing the methods by which it is to be obtained," *id.*, the Court declined to explore further the wisdom of congressional policy, or the "ingredients of industrial peace and stabilized labor-management relations." *Id.* at 234. As *Hanson* put it, "[t]he task of the judiciary ends once it appears that the legislative measure adopted is rele-

vant or appropriate to the constitutional power which Congress exercises." *Id.*

The Court returned to the union-shop question in *Street*, which construed the Railway Labor Act to not permit unions to extract mandatory dues from nonmembers to finance political or ideological activities. 367 U.S. at 768-69. The Court described *Hanson* as a narrow holding—namely, that the Railway Labor Act "was constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents." *Street*, 367 U.S. at 749. "Clearly we passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employees." *Id.*

The latter issue was, however, presented in *Street*. *Id.* at 744. The Court acknowledged that this issue raised constitutional questions "of the utmost gravity." *Id.* at 749. But the Court *avoided* answering those questions by construing the Railway Labor Act "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id.* at 768-69. *Street* was thus a decision of statutory construction, not constitutional interpretation.

Years later—and despite the narrowness of both of those prior holdings—the *Abood* Court extended *Hanson* and *Street* to the public sector. *Abood* involved a mandatory agency shop imposed by the government on public school teachers. And it involved the First Amendment's prohibition on compelled association, not the Commerce Clause or the Railway Labor Act.

But the *Abood* Court nevertheless determined that *Hanson* and *Street*, which "reflect[ ] familiar doctrines in the federal labor laws," supplied the necessary government interest to justify compelled association: namely, "[t]he principle of exclusive union representation" that "is a central element in the congressional structuring of industrial relations." 431 U.S. at 220; *see id.* at 222, 225-26. The Court held that "labor peace" and the avoidance of "free riders" (who would benefit from the union's bargaining and contract administration efforts without financially supporting them) were per se sufficient to justify the intrusion into individuals' First Amendment prerogatives. *Id.* at 224; *see id.* at 232.

Thus, *Abood* turned what had been a Commerce Clause, rational-basis justification for a particular Railway Labor Act provision into a government interest so compelling that it could trump public employees' First Amendment right to free association. The Court never acknowledged that transformation, so it did not explain why it was warranted. Nor did the Court assess whether forcing public employees to support a union was the least restrictive means of achieving the ends it had identified.

2. This radical expansion of the government's ability to compel its employees to associate with a union did not go unnoticed. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment remanding *Abood* for further proceedings—but dissented on the key First Amendment issue presented here. *See id.* at 244-45 (Powell, J., concurring in the judgment). As Justice Powell explained, *Hanson* and *Street* "concerned only congressional authorization of union-shop agreements in the private sector." *Id.* at 245. If anything, he said,

"*Street* suggests a rethinking of the First Amendment issues decided so summarily indeed, almost viewed as inconsequential in *Hanson*." *Id.* at 247-48.

Justice Powell recognized that "[t]he collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals." *Id.* at 252-53. And he concluded that any such "collective-bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation." *Id.* at 253.

Justice Powell then did what *Hanson* and *Street* did not (because they did not need to), and what the *Abood* majority did not (for reasons less clear): he identified and applied precedent recognizing that "even in public employment, 'a significant impairment of First Amendment rights must survive exacting scrutiny.'" *Id.* at 259 (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion)). Looking to *Buckley v. Valeo*, 424 U.S. 1 (1976), which had been decided the previous Term, Justice Powell observed that "[t]he only question after *Buckley* is whether a union in the public sector is sufficiently distinguishable from a political candidate or committee to remove the withholding of financial contributions from First Amendment protection." 431 U.S. at 256.

Answering that question, Justice Powell found "no principled distinction" between the two: "The ultimate objective of a union in the public sector, like that of a political party, is to influence public decision making in accordance with the views and perceived interests of its membership." *Id.* "In these respects, the public-sector union is indistinguishable from the traditional political party in this country."

Id. at 257. And, Justice Powell concluded, "[u]nder our democratic system of government, decisions on these critical issues of public policy have been entrusted to elected officials who ultimately are responsible to the voters." *Id.* at 258.

3. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 500 (2007)). And Justice Powell was right. There is no principled distinction between forcing individuals to associate with a public-sector union and forcing individuals to associate with a political advocacy group. In either case, the purpose for the mandatory association is to "petition the Government" over public affairs. U.S. Const. amend. I.

Since *Abood*, this Court has recognized that "[t]he dual roles of government as employer and policymaker . . . make the analogy between lobbying and collective bargaining in the public sector a close one," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (plurality opinion), and that a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences," *Knox*, 132 S. Ct. at 2289. The Court should no longer permit government to compel association for the inherently expressive purpose of petitioning the government. *See United States v. United Foods Inc.*, 533 U.S. 405, 415-16 (2001) (association cannot be compelled for purpose of expressive activity).

Moreover, *Abood* failed to consider whether labor peace can be "'achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts*, 468 U.S. at 623). There are alternative means to ensure workplace

harmony less onerous than forcing all employees to associate with one union. Government employers can deal with any workplace disruptions caused by employee support for rival unions through codes of employee conduct and disciplinary measures. And not engaging in monopoly bargaining impairs no constitutional rights. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009); *Smith v. Ark. State Hwy. Employees*, 441 U.S. 463, 465 (1979). Thus, "labor peace" does not justify compulsory representation vis-à-vis government because alternatives less onerous to associational rights are available.

C. "Labor Peace" Cannot Justify Compelled Association When the Employer Is Not Actively Managing and Supervising the Putative Employees or When Matters of Public Concern Are Involved.

If the Court declines to overrule *Abood*, the decision should at least be limited to its facts. *Abood* should apply only when government is acting in its capacity as an *employer* rather than *lawmaker*, to wit, where (1) the government is actively managing and supervising the affected individuals in its workplaces, and (2) the representation does not extend to matters of public concern.

1. "[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). "The government's interest in achieving

its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." 553 U.S. at 598 (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994)); *see Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006).

As employer, the "[g]overnment must have authority, in appropriate circumstances, to restrain employees who . . . frustrate progress towards the ends they have been hired to achieve." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011). Accordingly, a government employer's interest in effective human-resource management grants it significant authority to control the manner in which its employees petition management. *See id.* at 2495-96, 2500-01. And a government employer's interest in controlling the business occurring on its own property grants it greater authority to regulate expressive activity in its non-public workplaces. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

The "labor peace" interest, such as it is, arises from the government's unique interests in managing its employees within its workplaces. As the *Abood* majority described it, "labor peace" is an interest in avoiding workplace "confusion and conflict" caused by employee attempts to petition their employer through multiple representatives. 431 U.S. at 224. That "peace" is attained by suppressing this diverse petitioning by requiring that all employees deal with their employer only through a single, exclusive representative. *Id.* at 220-21.

In particular, exclusive representation in a public school was said to alleviate "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours,

class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* at 224. The "exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools," as it "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles." *Perry*, 460 U.S. at 52 (quoting *Haukvedahl v. Sch. Dist. No. 108*, No. 75C-3641 (N.D. Ill. 1976)).

2. Whatever its merits within a traditional employment relationship, the labor peace rationale has no application outside of it when government is acting as a policymaker. In that context, the government's relationship with an individual is that of lawmaker and citizen.

The government has no legitimate interest in preventing similarly situated *citizens* from making competing demands on it through diverse associations. That is the very essence of democratic pluralism. "The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox*, 132 S. Ct. at 2288 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). Thus, "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976). "The First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v.*

Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

This is true even if competing demands from diverse groups of citizens might be disruptive to government. The First Amendment demands tolerance for "verbal tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate." *Cohen v. California*, 403 U.S. 15, 24-25 (1971). Thus, association to influence public affairs cannot be lawfully suppressed absent extraordinary circumstances. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-13 (1982); *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937).

3. In cases involving compelled association, the line between policymaker and employer should draw from the compelling-interest test that is the core of the relevant First Amendment analysis. If the government purports to require exclusive representation as an employer, it must demonstrate that this exclusive representation is necessary to its efficient internal operations and is narrowly tailored to that end. This, in turn, should require the government to show, at a minimum, that: (a) the government is directly and actively managing and supervising the putative employees in its workplaces, and (b) the representation does not involve matters of public concern.

a. The first element—that the government directly manage the individuals subject to compelled association—speaks to the labor-management concerns that make designation of an exclusive representative arguably permissible in the first place. And it recognizes that those concerns are "compelling" only when individuals are actively managed and supervised by the government.

In virtually all of this Court's precedents recognizing the limits of a public employee's First Amendment rights, the right at issue was exercised in a workplace setting where the government directly and actively supervised the employee. For example, in *Guarnieri*, 131 S. Ct. at 2492, a police officer challenged the town council's directives against him that included, among other things, an admonishment that he not smoke in the municipal building. In *Perry Education Ass'n*, 460 U.S. at 39, a rival public school teachers' association challenged their exclusion from the use of the interschool mail system and teacher mailboxes. In *Garcetti*, 547 U.S. at 413-15, a deputy district attorney challenged adverse actions taken by his supervisors allegedly in retaliation for statements made to his supervisors (among others) in the course of his official duties. And in *Connick v. Myers*, 461 U.S. 138, 141 (1983), an assistant district attorney challenged adverse action taken against her after she prepared and distributed at work a questionnaire soliciting the views of her fellow staff members concerning, among other things, office morale and their level of confidence in supervisors.

These cases "reflect[ ] the importance of the relationship between the speaker's expressions and employment." *Garcetti*, 547 U.S. at 410. They also demonstrate that the criteria used to define the requisite "employment" relationship in the First Amendment context should establish the government's compelling need to restrict the putative employee's right to speak, associate, or petition—such as the government's active management and supervision of the individual.

b. The second element—that exclusive representation cannot regard matters of public concern—draws

from the law defining permissible restrictions on public employees' speech and petition rights. Those precedents recognize the distinction between matters of private concern and matters of public concern. *See, e.g.*, *Guarnieri*, 131 S. Ct. at 2501.

Whether "an employee's petition relates to a matter of public concern will depend on 'the content, form, and context of [the petition].'" *Id.* (quoting *Connick*, 461 U.S. at 147-48). The question is whether the issue can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. If it is one for which "free and open debate is vital to informed decision-making by the electorate," then it is a matter of public concern. *Id.* at 145 (quoting *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205*, 391 U.S. 563, 571-72 (1968)).

Holding that exclusive representation cannot extend to matters of public concern serves three critical functions. *First*, it recognizes that the First Amendment prohibits unions from forcing nonmember employees to financially support political and ideological activities. *See Knox*, 132 S. Ct. at 2284-85. As this Court has acknowledged, "[l]abor peace is not especially served by allowing" unions to charge a nonmember fees for lobbying the government—even for "financial support of the employee's profession." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520-21 (1991) (plurality opinion); *accord id.* at 559 (Scalia, J., concurring in judgment in relevant part). It follows that individuals cannot be exclusively represented for the purpose of lobbying government over public policies affecting their profession.

Second, not allowing exclusive representation to extend to matters of public concern ensures that in-

dividuals are not affiliated with political and ideological positions with which they may disagree. Designation of an exclusive representative forces individuals into an involuntary fiduciary relationship with a union, akin to that between trustee and beneficiary, in which the union has the legal right to speak and contract for the individuals, whether they approve or not. *See Teamsters Local 391 v. Terry*, 494 U.S. 558, 567 (1990). The putative employee is excluded "from engaging in a meaningful dialogue with his employer on the subjects of collective bargaining, a dialogue that is reserved to the union." *Abood*, 431 U.S. at 262 (Powell, J., concurring in the judgment). When the subjects of collective bargaining include issues of public concern, that bargaining is "'political' in any meaningful sense of the word." *Id.* at 257. And this has constitutional significance: "expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values," as "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Claiborne Hardware*, 458 U.S. at 913 (citation omitted).

Third, not permitting exclusive representation for influencing public policy is consistent with this Court's recognition that when even a real public employee "seeks to participate, as a citizen, in the process of deliberative democracy, either through speech or petition, 'it is necessary to regard the [employee] as the member of the general public he seeks to be.'" *Guarnieri*, 131 S. Ct. at 2500 (quoting *Pickering*, 391 U.S. at 574); *see also City of Madison*, 429 U.S. at 174-76 (unconstitutional to prohibit public employees exclusively represented by union from individually petitioning state employer in public forum). "[T]he

principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental decisions." *Abood*, 431 U.S. at 230. Accordingly, the principle of exclusivity cannot extend to governmental decisions of concern to citizens.

D. The Seventh Circuit and Illinois' Tests for When Association Can Be Compelled Are Unacceptable.

1. The Seventh Circuit adopted a very different test from that required by this Court's First Amendment precedents. It relied on a common-law definition of employment, and the concept of "joint employment," to determine whether *Abood* applied. Pet. App. 10a. Applying those concepts, the court held that homecare providers are jointly employed by Illinois because the State controls (1) how much providers are paid for their services; (2) which services are subsidized; and, (3) who is eligible to receive payment. Pet. App. 10a-11a.

But these factors do not establish—or even bear upon—whether Illinois has a compelling reason for forcing providers to accept and support an exclusive representative for petitioning the State. This Court has already rejected the proposition that constitutional claims for compelled association turn on the degree to which an individual or entity is economically dependent on government. *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 722-23 (1996).

O'Hare held that First Amendment protections applicable to public employees also applied to the removal of a tow-truck operator from a municipality's list of approved contractors due to the operator's refusal to support the mayor's reelection campaign.

The Court could see "no reason" why a First Amendment claim "should turn on [a] distinction, which is, in the main, a creature of the common law of agency and torts." *Id.* at 722. Such a distinction "'is at best a very poor proxy for the interests at stake.'" *Id.* at 721 (quoting *Board of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996)). The Court "ha[s] been, and . . . remain[s], unwilling to send courts down that path." *Id.* at 723.[8]

The joint employment concept is inapposite not only for this reason, but also because it does not focus on the constitutionally relevant relationship. The pertinent question here is whether *Illinois'* relationship with providers is by itself sufficient to justify compulsory representation for dealing with the State. If not, that is the end of the matter. That the State and homecare patients, taken together, may constitute a full employer of providers is irrelevant.

Indeed, joint employment is a statutory concept that arises from the National Labor Relations Act's definition of "employee," which excludes "independent contractors." 29 U.S.C. § 152(3). Whether someone is a joint employee, as opposed to an independent contractor, is relevant to whether they are subject to that federal law, *see Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), and similar state labor laws. This statutory concept has no relevance to the constitutional analysis here.

2. Although the lower court's standard is unsound, it pales in comparison to the State's standard. In its

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[8] The common-law employment test is particularly ill-suited for First Amendment line drawing; it has 13 factors, none of which is determinative. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

appellate brief, Illinois asserted that "the *political branches* have authority to determine the circumstances that justify collective bargaining," (emphasis added), and proffered the following rule:

> The State may compel contributions to a diverse array of "mandatory associations" analogous to unions when (a) the State has concluded that collective action among participants in a government enterprise *will facilitate the goals of that enterprise*; and (b) compelled contributions are necessary to prevent free riders from undermining the association and thwarting its purpose.

State Br. 5-7 (7th Cir. Docket No. 25, filed Apr. 20, 2011) (emphasis added).

Almost any person or entity with some connection to a public program could be collectivized under that standard. Illinois' boundless assertion of power shows utter disregard for the fundamental right of each person to choose with whom he or she associates to petition government, and cannot be adopted.

Instead, if allowed at all, government should be permitted to compel individuals to associate with a union only when it serves a compelling government interest. Such an interest can exist only when government is actively managing the individuals and the representation does not extend to matters of public concern. This ensures that the "labor peace" justification burdens First Amendment freedoms only as necessary to avoid workplace disruptions, and does not impair the right of citizens to choose with whom they associate to influence public policy.

E. As *Knox* Implied, Compulsory Fees Are Not a Necessary Incident of Exclusive Representation.

"[I]n the rare case where a mandatory association can be justified" by a compelling state interest, "compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Knox*, 132 S. Ct. at 2289 (quoting *United Foods*, 533 U.S. at 414). If this Court leaves *Abood*'s labor peace rationale for exclusive representation intact, it should make clear that its "free-rider" rationale for compulsory fees—i.e., the proposition that individuals who may benefit from that representation should pay for its costs, 431 U.S. at 222—is invalid.

In *Knox*, this Court held that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." 132 S. Ct. at 2289. The Court should disavow the free-rider argument entirely because it is: (1) "not well reasoned," *Citizens United*, 558 U.S. at 363; (2) not a state interest; and (3) not necessary for exclusive representation.

First, "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly." *Knox*, 132 S. Ct. at 2290. It is an anomaly because it is well established that individuals are not obligated to pay for unsolicited services they were forced to accept. *See id.* at 2289-90 (citing examples); Restatement (Third) of Restitution & Unjust Enrichment, § 2(4) ("Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse."); *Force v. Haines*, 17 N.J.L. 385, 386-87 (1840) ("Now the

great and leading rule of law is, to deem an act done for the benefit of another, without his request, as a voluntary courtesy, for which, no action can be sustained.").

This principle is particularly apposite here given that imposing exclusive representation on dissenting individuals for purposes of petitioning government infringes on their First Amendment rights. *See* p. 37, *infra*. To additionally force those individuals to financially support this infringement on their rights is to use one constitutional injury to justify yet another. It is akin to requiring that kidnapping victims pay their captor for room and board.

Unions often assert that their statutory duty to represent all individuals in a bargaining unit justifies compulsory fees. This contention fails because unions voluntarily seek and assume the mantle of exclusive representative. Nothing requires that they do so—unions could choose to represent only their voluntary members if they wished. *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236-37 (1938).

Here, SEIU-HII could lobby Illinois over its home-care policies for providers who *voluntarily* choose to support it, just like other advocacy groups that depend on voluntary support. Instead, the Union chose to have Governor Blagojevich designate it as the exclusive representative of all providers by executive order. SEIU-HII cannot now complain that the power it demanded is somehow an onerous burden.

Exclusive representation is not a burden on unions, but an extraordinary power that almost no other organization enjoys. It gives unions the legal right to speak, contract, and otherwise represent all individuals in a group, whether they approve or not. Any

union complaints about the heaviness of this crown are difficult to take seriously.

Second, even if unions had an equitable interest in exacting fees from dissenters (which they do not), that is not a *government* interest. In cases of compelled association, "care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice." *Elrod*, 427 U.S. at 362. States cannot force individuals to support unions merely because that serves union self-interests.

Third, the free-rider rationale fails because compulsory fees are not "a 'necessary incident'" of exclusive representation, *Knox*, 132 S. Ct. at 2289 (quoting *United Foods*, 533 U.S. at 414). Exclusive representation exists without compulsory fee requirements in the federal government, 5 U.S.C. § 7102, the postal service, 39 U.S.C. § 1209(c), and the nation's twenty-four right-to-work states.[9] It does so because unions can solicit voluntary support for their representation.

As experience proves, compulsory fees are not necessary to support exclusive representation. Accordingly, even if individuals can be forced to accept this type of mandatory association, it is unconstitutional to force them to pay for this infringement on their First Amendment rights.

II. ILLINOIS' PROVIDER UNIONIZATION LAWS ARE UNCONSTITUTIONAL.

If this Court overrules *Abood*, the Seventh Circuit's decision necessarily falls with it. If this Court instead limits *Abood* to its facts by adopting the Pro-

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[9] *See* http://www.nrtw.org/rtws.htm (last visited Nov. 19, 2013).

viders' test, the Seventh Circuit's decision should still be reversed because Illinois neither actively manages the providers nor limits exclusive representation to matters not of public concern—not to mention that Illinois has failed to use the least restrictive means to achieve its ends. And if the Court were to apply the common-law employment test the Seventh Circuit used, shorn of its errant reliance on *Abood*, that court's decision still fails because the providers are not State employees even under common law. All roads lead to reversal.

A. Illinois Is Compelling Association for Purposes of Petitioning the State.

Illinois forces Rehabilitation Program providers to associate with SEIU-HII in two ways. *First*, the State requires that providers accept SEIU-HII as their "exclusive representative" for dealing with State agencies. J.A. 23-24. Thrusting providers into this mandatory agency relationship infringes on their associational rights, as it inextricably affiliates them with the Union's petitioning, speech, and policy positions. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010). Indeed, that is the entire point of the "exclusive representative" designation—to establish that SEIU-HII speaks not for itself, but as the proxy of all providers.

Second, Illinois compounds this associational injury by forcing providers to financially support SEIU-HII—to the tune of at least $3.6 million every year. J.A. 24-25. "[C]ompulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox*, 132 S. Ct. at 2289 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). Indeed,

exacting compulsory fees even from public employees is an "'unusual' and 'extraordinary'" exercise of state power. 132 S. Ct. at 2291 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184, 187 (2007)).

Illinois' compulsory fee is particularly odious because it is not only a condition of working as a provider, but, for many providers, is a condition of caring for a disabled family member so that he or she may live at home. For example, Providers Susan Watts and Theresa Riffey are forced to choose between paying hundreds of dollars each year to the SEIU-HII or not being able to provide homecare to their daughter and sister, respectively, to prevent their institutionalization. J.A. 18. Illinois' decision to impose this Hobson's choice on providers is not only unconstitutional, it is unconscionable.

The State is forcing providers to associate with the SEIU-HII for an inherently expressive purpose: "petition[ing] the Government for a redress of grievances." The SEIU's statutory function as providers' mandatory representative is to meet and negotiate with State officials over the Rehabilitations Program's reimbursement rates and related policies. *See* 5 Ill. Comp. Stat. 315/7; 20 Ill. Comp. Stat. 2405/3. This is "petition[ing] the Government" over a matter of public concern. *See* pp. 40-41, *infra*. It is functionally indistinguishable from forcing these providers to lobby the State for greater Medicaid reimbursement rates through a State-appointed lobbyist.

Given that Illinois is compelling association for an expressive purpose, its conduct is subject to the "exacting First Amendment scrutiny" tests set forth in *Knox*, 132 S. Ct. at 2289. As established below, the State cannot satisfy these tests.

B. Illinois Has No Compelling Interest in Designating an Exclusive Representative for Homecare Providers to Petition the State.

1. Illinois cannot rely on the "labor peace" rationale to justify its exclusive-representation laws, because homecare providers are not managed or supervised by the State, but by the persons with disabilities who employ them. Nor do the providers work in State workplaces; they work in the private homes of the person they serve. The State, therefore, cannot plausibly claim that exclusive representation is necessary to prevent providers from disrupting its internal managerial functions or workplaces by petitioning it over Medicaid rates through multiple associations.[10]

For the same reasons, when homecare providers petition the State on matters related to the Rehabilitation and Disabilities Programs, they do so in their capacity as *citizens*. Providers' expressive activity in this respect is no different from that of physicians, hospitals, or any other health-service provider seeking changes to Medicaid policies.

The State has no interest in suppressing providers' ability to petition it through diverse associations. *See Abood*, 431 U.S. at 261 (Powell, J., concurring in the judgment) ("I would have thought the 'conflict' in ideas about the way in which government should operate was among the most fundamental values pro-

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[10] There is no record here of any unrest caused by providers' petitioning. To the contrary, the State complains about an ostensible *lack* of effective petitioning by providers, not too much of it. *See* Pet. App. 46a (EO 2003-08) (positing that personal assistants "cannot effectively voice their concerns" to the State "without representation"); Pet. App. 49a (EO 2009-15) (same).

tected by the First Amendment."). Diverse association among providers to influence State policy is a proper functioning of the democratic process. The First Amendment guarantees freedom to associate to petition government precisely to encourage such pluralism. *See, e.g.*, *Knox*, 132 S. Ct. at 2288; *City of Madison Joint Sch. Dist.*, 429 U.S. at 175-76; *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). Illinois has no lawful interest in imposing exclusive representation on providers to prevent them from making conflicting demands on the State about its Medicaid policies through multiple advocacy organizations.

2. The "labor peace" rationale also fails in this case because the Union exclusively represents providers to "negotiate" with State officials over matters of *public concern*; namely, the Rehabilitation Program's reimbursement rates and related policies. *See* 5 Ill. Comp. Stat. 315/7; 20 Ill. Comp. Stat. 2405/3 (defining subjects of "collective bargaining" for personal assistants). There is a better word to describe these "negotiations" with the State: the word is "lobbying." *See Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) (to "lobby" means "to conduct activities aimed at influencing public officials," and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group"); *cf.* 2 U.S.C. § 1602(7)-(8) (defining "lobbying contact" as "any oral or written communication . . . to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to . . . the administration or execution of a Federal program or policy").

Interest groups representing medical practitioners often lobby government over Medicaid programs. In

2012 alone, organizations representing "health professionals" expended over $80 million lobbying just the federal government, and over 800 individuals or entities hired someone to lobby the federal government over Medicaid and Medicare.[11] The Union's function is no different than that of other interest groups or lobbyists that petition government on behalf of medical practitioners.

For example, a voluntary association of homecare providers would be lobbying the State over a matter of public concern if it met and spoke with DHS officials to request higher Medicaid rates. Under the Seventh Circuit's view, however, when SEIU-HII engages in this activity, it is "collective bargaining" that all providers can be forced to support under *Abood*. But the expressive activity is *identical*. Whatever the label, the act of seeking an audience with the State is quintessentially "petition[ing] the Government" over a matter of public concern within the First Amendment's meaning.

A contrary conclusion—i.e., that policy issues like Medicaid rates are internal employment matters fit for mandatory "collective bargaining"—would erase the already tenuous distinction between lobbying and collective bargaining found in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520-21 (1991) (plurality opinion). If this distinction is going to be maintained

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[11] *See* Center for Responsive Politics at http://www.opensecrets.org/lobby/indusclient.php?id=H01&year=2012 (last visited Oct. 15, 2013), and http://www.opensecrets.org/lobby/issuesum.php?id=MMM&year=2012 (last visited Oct. 15, 2013) (data based on lobbying reports filed with the U.S. Senate Office of Public Records).

at all,[12] petitioning regarding government programs that affect individuals must be considered issues of public concern for which association cannot be lawfully compelled. *See Knox*, 132 S. Ct. at 2294-95 (holding union fee for "lobbying the electorate" not germane to collective bargaining because that "would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities"); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997) (Silberman, J.) (holding union's contacts with federal agencies about safety regulations not chargeable to nonmembers because it "would swallow the *Lehnert* rule"), *aff'd on other grounds*, 523 U.S. 866 (1998).

Accordingly, the State's designation of an advocacy group to serve as providers' representative is not justified by the mere incantation of "labor peace." That interest is neither present nor cognizable here.

3. In any event, Illinois' reliance on labor peace is a relatively late-breaking one. Originally, the State rested on its belief that "it is essential for the State to receive feedback from the personal assistants in order to effectively and efficiently deliver home services," and that providers "cannot effectively voice their concerns . . . without representation." Pet. App. 46a (EO 2003-08); *accord* Pet. App. 49a (EO 2009-15). But that claimed interest in "feedback" goes much the same way as labor peace: neither is so

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[12] Providers submit that petitioning regarding wages and benefits given to public employees also involves matters of public concern, and that *Abood* should be overruled for this reason. *See* p.23, *supra*. However, even if the Court disagrees with that, petitioning regarding Medicaid programs must cross the line into policymaking, lest such a line not exist at all.

compelling as to override providers' First Amendment rights.

The "feedback" rationale fails at the outset because association cannot be compelled for the very purpose of generating speech. In *United States v. United Foods*, a federal program requiring business owners to subsidize an advertising campaign was held unconstitutional because the program's principal purpose was to require speech. 533 U.S. 405, 415-16 (2001). This Court has never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* at 415. Thus, Illinois cannot compel providers to petition it through an exclusive representative because the State believes that petitioning may be useful to it. [13]

Conversely, an ostensible lack of "feedback" from providers is no justification for compelling them to speak to the State through a designated advocate. This Court has steadfastly rejected the "paternalistic premise" that expressive activities can be regulated because persons "are incapable of deciding for themselves the most effective way to exercise their First Amendment rights." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790 (1988). "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 790-91. Thus, "the government, even with the purest of motives, may not sub-

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[13] For similar reasons, the State cannot impose a compulsory representative on providers based on an assertion that they lack sufficient political influence or power. *Cf. Citizens United v. FEC*, 558 U.S. 310, 350 (2010) ("reject[ing] the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections'") (*quoting Buckley v. Valeo*, 424 U. S. 1, 48 (1976)).

stitute its judgment as to how best to speak for that of speakers . . . ; free and robust debate cannot thrive if directed by the government." *Id.* at 791.

Illinois' essentially limitless "feedback" rationale therefore should be rejected as incognizable.[14] A governmental desire for input on policy issues cannot justify imposing monopoly representation on an interested subset of its citizens.

4. The Seventh Circuit's analysis also was flawed on its own terms. Even if this Court were to conclude that labor peace justifies compelled association anytime a common-law employment relationship exists, there is no such relationship here. *See* J.A. 20-21.

Illinois regulations recognize that the Medicaid "*customer shall serve as the employer* of the [personal assistant]." Ill. Admin. Code tit. 89, § 676.30(b) (emphasis added). Those regulations further require that "[i]n order to be employed by a customer as a PA . . . an individual must: . . . complete an EMPLOYMENT AGREEMENT between the customer and PA that certifies the PA . . . shall agree that the customer is responsible for locating, choosing, employing, supervising, training, and disciplining as necessary the PA." *Id.* § 686.10(h)(7) (emphasis in original). And, "[a]lthough DHS shall be responsible for ensuring that the funds available under the [Rehabilitation Program] are administered in accordance with all applicable laws, DHS shall *not* have control or input

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[14] The feedback rationale is also not compelling, as it defies credulity that the State has such a desperate need for SEIU-HII's advice on provider reimbursement rates that it could justify annually forcing 20,000 providers to subsidize that interest group. As with other public-assistance programs, the State can competently address how to administer Medicaid programs through normal administrative and legislative procedures

in the employment relationship between the customer and the personal assistants." *Id.* § 676.10(c) (emphasis added).

The ILRB thus was correct in finding that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (service recipients)." *Dep't of Cent. Mgmt. Servs.*, 2 PERI P 2007, at *2.

The Seventh Circuit erred in finding that the State exercises employer-like "control by approving a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions and annually reviews each personal assistant's performance." Pet. App. 11a. The service plan is jointly developed by the Medicaid customer, his physician, and a State-appointed counselor, and must be approved by a physician. *See* Ill. Admin. Code tit. 89, § 684.10. The plan's purpose is to identify which homecare services are medically necessary and best serve the customer's needs. *See id.* §§ 684.10(a), 684.70(a). Annual evaluations are conducted "*by the customer* with assistance of the counselor." *Id.* § 686.30(a) (emphasis added). These program requirements only show that the Medicaid customer, not the State, is in charge of his or her provider.

Illinois itself does not consider providers to be its employees—*except for the sole purpose of unionization*. *See* 20 Ill. Comp. Stat. 2405/3(f). The State's decision to change the label affixed to this relationship solely for the purpose of unionization does not change the practical reality: Program participants, not the State, are the providers' "employers."

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For all of these reasons, Illinois lacks a compelling reason for forcing providers to accept and support an exclusive representative to petition the State over its Medicaid policies. The mandatory association required by the 2003 Act should be struck down.

C. Substantially Less Intrusive Means Are Available to the State to Encourage Feedback from Homecare Providers.

Even if Illinois had a compelling interest for its mandatory-association regime, Illinois must still prove that the specific method it chose—forcing providers to associate with SEIU-HII—is the least restrictive way to fulfill that purpose. For

> it is not enough that the means chosen in furtherance of the interest be rationally related to that end. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, and the government "must emplo[y] means closely drawn to avoid unnecessary abridgment."

Elrod v. Burns, 427 U.S. 347, 362-63 (1976) (plurality opinion) (quoting *Buckley*, 424 U.S. at 25). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 363 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973)); *see Knox*, 132 S. Ct. at 2291 & n.3.

Precision is sorely lacking here. If "feedback" is the goal, there are numerous alternatives readily available short of forcing homecare providers to affiliate with a union. To name one, if State officials want to meet and confer with SEIU-HII over Medicaid rates, they can simply do so. *See Minnesota State Bd. for*

Cmty. Colls. v. Knight, 465 U.S. 271, 282-83 (1984).[15] The State does not need to conscript providers into the Union's ranks in order to consult with the Union about matters of public policy.

The State can also solicit feedback from providers themselves, by requesting comments in rulemaking, holding meetings, sending them questionnaires, or polling them. Such means are commonly used to solicit citizens' input on issues of public policy and are "significantly less restrictive of associational freedoms," *Roberts*, 468 U.S. at 623, than forcing the providers to accept a compulsory representative.

If anything, making SEIU-HII the providers' exclusive representative serves only to *reduce* "feedback" on potential policy changes. DHS now cannot confer with providers themselves over Medicaid rates; it may deal only with the Union. *See Board of Educ. v. IELRB*, 250 Ill. App. 3d 878, 883, 620 N.E.2d 418, 421 (1993). The State's means thus are not narrowly tailored to its professed end; indeed, they are at odds with it.[16]

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[15] *Knight* held that government officials can generally choose with whom they meet and confer because "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." 465 U.S. at 283. Of course, that Illinois can choose to whom it listens under *Knight* does not give it any right to dictate who shall speak for providers. *Knight* twice states that claims of compelled association were not at issue there. *Id.* at 289 n.11, 291 n.13.

[16] For similar reasons, Illinois cannot justify collectivization as necessary for improving the Rehabilitation or Disabilities Programs. If the State wants to increase reimbursement rates, or make any other changes to these Medicaid programs, it can simply do so, without forcing providers to accept and support mandatory representation.

The State has never explained how a compulsory union fee is even rationally related to encouraging greater feedback from the providers—much less narrowly tailored to that interest. The State's silence is understandable; for there is *no* connection between the compulsory fees and the asserted "feedback" rationale. For this reason also, the Illinois provider unionization laws violate the First Amendment.

D. Compulsory Fees Are Not a Necessary Incident of a Valid Regulatory Purpose.

Illinois' exaction of compulsory fees from providers in the Rehabilitation Program also fails the second requirement for mandatory association—that such fees be "a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Knox*, 132 S. Ct. at 2289 (quoting *United Foods*, 533 U.S. at 414). In other words, the fees must be "germane to a purpose related to an association independent from the speech itself." *United Foods*, 533 U.S. at 415. "Were it sufficient to say speech is germane to itself, the limits observed in *Abood* . . . would be empty of meaning and significance." *Id.*

The purpose Illinois identified in the executive orders was the need for more "feedback" from homecare providers. Pet. App. 46a (EO 2003-08); Pet. App. 49a (EO 2009-15). The infringement on First Amendment rights is not incidental to this governmental purpose; it *is* the purpose. And that contravenes *United Foods* because association cannot be compelled for the very purpose of generating speech. 533 U.S. at 415; *see* p. 43, *supra*.

The State also cannot rest on an argument that compulsory fees are necessary to prevent providers from "free riding" on SEIU-HII's petitioning of the

State for the reasons stated at pp. 34-36, *supra*. In *Knox*, this Court recognized that "'[i]f a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.'" 132 S. Ct. at 2289-90 (quoting Summers, Book Review, *Sheldon Leader, Freedom of Association: A Study in Labor Law and Political Theory*, 16 Comp. Lab. L.J. 262, 268 (1995)). The same principle applies to providers forced to support the Union's lobbying of the State for higher Medicaid rates—they should have no obligation to pay for this unsolicited political activity.

E. Affirmance of the Seventh Circuit Could Subject Participants in Many Public Benefit Schemes to Collectivization.

The Seventh Circuit applied a watered-down First Amendment test (we will not even call it "scrutiny") to conclude that Illinois could properly compel providers to accept and support an exclusive representative for dealing with the State. The implications of that extension of compulsory representation to individuals who provide services to public-aid recipients are vast. If upheld, the precedent will open the door to the collectivization of many professions for purposes of petitioning government over public-aid programs that pay for their services to others.

The Seventh Circuit attempted to minimize these implications. It asserted that "[w]e hold simply that the State may compel personal assistants as *employees*—not contractors, health care providers, or citizens—to financially support a single representative's exclusive collective bargaining representation." Pet. App. 14a-13a (emphasis in original).

But even this holding has broad ramifications, given that similar self-directed Medicaid programs exist in almost every state. *See* p.8, *supra*. These programs share the basic features of the Rehabilitation Program. *See Self-Direction Handbook*, 1-2 to 1-10, 2-3 to 2-5; *Medicaid Primer*, 179-80; *see also* 42 C.F.R. § 441.301(b)(1) (condition of Medicaid waiver that state furnish homecare services pursuant to a plan of care). Any providers reimbursed by these Medicaid programs—i.e., personal assistants, nurses, and therapists—are susceptible to compulsory representation under the lower court's ruling. Indeed, fourteen states have authorized the collectivization of these types of Medicaid providers.[17]

The implications of the Seventh Circuit's standard extend far beyond homecare providers. The court's rule deems individuals jointly employed by government under *Abood* if a public-aid program exerts "significant control" over their jobs by: (1) *paying* for the service; (2) defining *what* services will be reimbursed; and/or (3) limiting *who* is eligible to receive payment. Pet. App. 10a-11a. It is unclear if all factors must be present, or just one. Importantly, that an individual is hired, managed, supervised, and

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[17] Cal. Welf. & Inst. Code, § 12301.6(c)(1); Conn. Pub. Act 12-33 (May 14, 2012); 20 Ill. Comp. Stat. 2405/3(f); Md. Code Ann. Art. 9, §§ 15-901 *et seq.*; Mass. Gen. Laws ch. 118G, § 31(b); Interlocal Agreement between Mich. Dep't of Cmty. Servs. & Tri-County Aging Consortium (June 10, 2004) (rescinded); Minn. Stat. §§ 179A.50-52; Mo. Rev. Stat. § 208.862(3); Ohio H.B. 1, §§ 741.01-.06 (July 17, 2009) (expired); Or. Const. art. XV, § 11(f); Or. Rev. Stat. § 410.612; Pa. Exec. Order 2010-04 (Sept. 14, 2010) (rescinded); Wash. Rev. Code § 74.39A.270; Wis. Stat. § 111.81 *et seq.* (repealed); Vt. Pub. Act 13-48 (May 24, 2013).

otherwise employed by a third party is irrelevant under the lower court's rule. Pet. App. 11a.

This broad standard can encompass almost anyone receiving government money for a service. When it pays for a service, the government necessarily defines *how much* it will pay, for *what* services it will pay, and *whom* it will pay to perform them. By way of example:

Medicare Home Health Benefits. Medicare subsidizes certain home-based services, 42 U.S.C. § 1395x(m). As of 2008, there were 290,439 Medicare-funded home health employees.[18] As with Medicaid-funded programs, Medicare requires that home-based services be provided pursuant to "a plan (for furnishing such items and services to such individual) established and periodically reviewed by a physician," *id.*; *see* 42 C.F.R. § 424.22(a)(1)(iii), and limits who can perform these services. *See, e.g.*, 42 U.S.C. § 1395bbb(a)(3) (qualification requirements); 42 C.F.R. § 484.4 (same).

Much like the providers here, a Medicare-funded "home health aide provides services that are ordered by the physician in the plan of care," to "include the provision of hands-on personal care, performance of simple procedures as an extension of therapy or nursing services, assistance in ambulation or exercises, and assistance in administering medications that are ordinarily self-administered." 42 C.F.R. § 484.36(c)(2). However, unlike here, Medicare-funded home health aides are not directly employed by the patient, but are employees or contractors of a

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[18] National Ass'n for Home Care & Hospice, *Basic Statistics About Home Care*, Table 8 (2010), www.nahc.org/assets/1/7/10HC_Stats.pdf (last visited Nov. 20, 2013).

home health agency. *See id.* § 484.36(d)(4); 42 U.S.C. § 1395x(o)(2). But, under the Seventh Circuit's "joint employer" standard, that is a distinction without a difference. It simply makes the federal government the Medicare providers' joint employer along with the home health agency.

Adult Foster Care. A number of state Medicaid programs pay for care of the disabled and elderly in private residential settings other than their homes—i.e., "adult foster care."[19] Two states, Oregon and Washington, have already moved to compel proprietors of adult foster homes to accept exclusive union representatives to bargain with the states over Medicaid reimbursement rates for their services. *See* Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029.

Traditional Medicare and Medicaid. Nothing limits the reach of the Seventh Circuit's standard to homecare. It extends to practitioners reimbursed by traditional Medicare and Medicaid plans, who logically satisfy the court's tripartite control criteria.

Under Medicare Part B, the federal government (1) sets the rate of payment for medical services via a fee schedule, *see* 42 C.F.R. § 414.1–414.68; (2) controls which services it will subsidize, *see id.* §§ 424.5(a)(1), 424.24; and (3) limits whom it will pay to perform those services. *Id.* § 424.500-565 (enrollment requirements for healthcare practitioners to receive payment). Fee-for-service Medicaid plans

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[19] *See* Janet O'Keeffe *et al.*, U.S. Dep't of Health & Human Servs., *Using Medicaid to Cover Services for Elderly Persons in Residential Care Settings* (Dec. 2003), http://aspe.hhs.gov/daltcp/reports/med4rcs.pdf (last visited Nov. 20, 2013).

work much the same way.[20] Under the lower court's standard, physicians and other practitioners who care for Medicare patients could be deemed half-employed by the federal government, and thus susceptible to the imposition of a mandatory representative to bargain with their ostensible federal employer over Medicare rates.

This includes practitioners who have contracting or employment relationships with hospitals or other organizations, for that is no barrier to collectivization vis-à-vis government under the lower court's "joint employer" standard. For instance, Illinois' 2013 Act extends unionization to those who provide homecare services "no matter whether the State provides those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise." 5 Ill. Comp. Stat. 315/3(n). If being employed by a Medicaid enrollee is no barrier to being collectivized for petitioning the State, then being employed by a hospital or managed care organization is not either.

Childcare Providers. Every state operates a program that subsidizes childcare expenses of low-income families pursuant to federal Child Care and Development Fund programs.[21] Families enrolled in these programs can generally choose the private

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[20] *See generally* 42 C.F.R. § 430.0 ("Within broad Federal rules, each State decides . . . types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services."); 42 U.S.C. § 1396a(a)(30).

[21] *See* U.S. Gov't Accountability Office, GAO-04-786, *Child Care: State Efforts to Enforce Safety & Health Requirements*, 4-6 (2004).

childcare provider of their choice, including: (1) home-based "family child care" businesses; and (2) "relative care providers" who, as the name implies, are family members who care for related children in their own homes. *See* 45 C.F.R. § 98.2 (defining "eligible child care provider" and "family child care provider").

Beginning in 2005—with Illinois again in the vanguard—states began imposing mandatory representatives on these childcare providers to petition states over their childcare subsidy rates for indigent children. To date, eighteen (18) states have authorized mandatory representation for home childcare providers, and fourteen (14) permit or permitted the exaction of compulsory fees.[22] The constitutionality of this forced association is being challenged. *See Schlaud v. UAW*, 717 F.3d 451 (6th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3101 (U.S. Aug. 19, 2013) (No. 13-240); *Parrish v. Dayton*, No. 13-2739

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[22] Conn. Pub. Act 12-33 (May 14, 2012); 5 Ill. Comp. Stat. 315/3, 315/7; Iowa Exec. Order 45 (Jan. 16, 2006); Kan. Exec. Order 07-21 (July 18, 2007); Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C) (repealed); Md. Code Ann. art. 5, § 5-595 *et seq.*; Mass. Gen. Laws ch. 15D, § 17; Interlocal Agreement Between Mich. Dep't of Human Serv. and Mott Cmty. Coll., (July 27, 2006) (repealed); Minn. Stat. § 179A.54; N.M. Stat. Ann. § 50-4-33; N.J. Exec. Order 23 (Aug. 2, 2006); N.Y. Lab. Law § 695; Ohio H.R. 1, § 741.01-.06 (July 17, 2009) (expired); Or. Rev. Stat. § 657A.430; Pa. Exec. Order 2007-06 (June 14, 2007); R.I. Gen. Laws § 40-6.61 *et seq.*; Wash. Rev. Code § 41.56.028; Exec. Budget Act, 2009 Wis. Act 28, § 2216j (codified at Wis. Stat. § 111.02 *et seq.*) (repealed). Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Missouri, New York, New Mexico, Oregon, Rhode Island, and Washington authorize the exaction of compulsory fees from childcare providers, and the exactions were formerly permitted in Michigan, Ohio, and Wisconsin.

(8th Cir. 2013) (appeal pending). But under the Seventh Circuit's standard, it could be constitutional.

Government Contractors. Perhaps most susceptible of all to collectivization under the lower court's ruling are government contractors, as their relationship with government is much closer than that of Medicaid, Medicare, or childcare providers, who are third-party recipients of benefits provided to individuals enrolled in those public-aid programs. Government bodies necessarily (1) pay their contractors to (2) perform a defined service and (3) choose with whom they contract.[23] In fact, the government-contractor hypothetical proves the lack of structure to the Seventh Circuit's rule: Government contractors are not public "employees," but these contractors more than satisfy the Seventh Circuit's expansive criteria governing when mandatory representation is constitutionally permissible.

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This Court should close the Pandora's Box opened by the Seventh Circuit. It should overrule *Abood*, or at least limit it to its facts by adopting the First Amendment test the Providers advance. And the Court should conclude that the Seventh Circuit has permitted an unconstitutional encroachment on the fundamental right of every person to choose the organization with which he or she associates "to petition the Government for a redress of grievances." The

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[23] *Cf., e.g.*, Office of Federal Procurement Policy Act (1974), Pub. L. No. 93-400, 88 Stat. 796, § 2(1) ("Establishing policies, procedures, and practices which will require the government to acquire . . . services of the requisite quality and within the time needed at the lowest reasonable cost, utilizing competitive procurement methods . . . .").

decision below should be reversed, and the case remanded with instructions to find Illinois' exclusive-representation laws unconstitutional.

III. THE DISABILITIES PROGRAM PROVIDERS' CLAIMS ARE RIPE FOR ADJUDICATION.

The Seventh Circuit upheld the district court's dismissal of the Disabilities Program Providers' claims as unripe because those providers have not yet been involuntarily unionized by the State. But they remain under threat of unconstitutional action. If they want to ward off such action, they must expend resources to encourage other providers to vote any union down. And adding constitutional insult to injury, under the Seventh Circuit's ruling, they must wait until their fundamental First Amendment rights have been violated to challenge the imposition of an exclusive representative.

1. This Court has recognized that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). This principle is vital in the First Amendment context because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 & n.29. Accordingly, Providers in the Disabilities Program are entitled to seek injunctive relief against EO 2009-15 *before* they are unconstitutionally collectivized under it.

For this reason, a plaintiff should be required only to show standing in order to state a ripe claim in cases involving First Amendment compelled-

association claims. That is, a claim can be ripe if it is "based on a 'substantial risk' that [a] harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013).

Babbitt is instructive. There, a union challenged a labor statute on constitutional grounds, including provisions governing union elections. 442 U.S. at 299-301. Even though the union never invoked those election procedures, the Court found the union's challenge ripe for adjudication because "awaiting . . . an election would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment." *Id.* at 300-01.

Babbitt's reasoning applies with particular force here because "[t]he Disabilities Program plaintiffs complain of the same conduct as the Rehabilitation Program plaintiffs." Pet. App. 14a. And the Seventh Circuit recognized that its decision with respect to the Disabilities Providers would likely be controlled by its decision regarding the Rehabilitation Providers. Pet. App. 16a. This justifies consideration of the merits of the Disabilities Program Providers' claims along with the merits of the Rehabilitation Program Providers' claims as set forth above.

2. Providers in the Disabilities Program are subject to an "actual and ongoing threat" of being unionized under EO 2009-15. J.A. 28; *see Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1289 (11th Cir. 2010) (employee had standing to challenge union organizing agreement because it "will substantially increase the likelihood that [he] will be unionized against his will"). To avoid compelled unionization, Providers will "reasonably incur costs to mitigate or

avoid th[e] harm." *Clapper*, 133 S. Ct. at 1150 n.5. They already spent time and treasure campaigning against unionization in the last election called under EO 2009-15. J.A. 27. "Harris alone spent $1,342.02 for this purpose." J.A. 27. If another election is requested, they will again have to "expend time and money to prevent this infringement on their Constitutional rights." J.A. at 28. Accordingly, these Providers' constitutional claims against EO 2009-15 are ripe for adjudication.

3. The Seventh Circuit failed to appreciate the substantial likelihood of constitutional injury to the Disabilities Program Providers because it mischaracterized the injury as occurring only *after* the State had designated a particular union as the exclusive representative. But for the State to put to a vote the Providers' individual rights to choose with whom they associate to petition government is itself antithetical to constitutional guarantees. The First Amendment exists to protect individual rights *from* majority rule. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000) (noting that the "right [to associate] is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"). The Disabilities Program Providers' right to free association should not be subjected to the tyranny of the majority. Their claims should be adjudicated now.

CONCLUSION

For all of the foregoing reasons, the Seventh Circuit's judgment should be reversed, Illinois' exclusive-representation laws for homecare providers held unconstitutional, and the case remanded with instructions to the lower court to grant appropriate relief to Providers.

Respectfully submitted,

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ADDENDUM

STATUTORY ADDENDUM

Illinois Public Labor Relations Act (relevant sections only)

5 Ill. Comp. Stat. 315/3(f),(g),(n) Definitions.

As used in this Act, unless the context otherwise requires: * **

(f) "Exclusive representative", except with respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers, and peace officers in the Department of State Police, means the labor organization that has been (i) designated by the Board as the representative of a majority of public employees in an appropriate bargaining unit in accordance with the procedures contained in this Act, (ii) historically recognized by the State of Illinois or any political subdivision of the State before July 1, 1984 (the effective date of this Act) as the exclusive representative of the employees in an appropriate bargaining unit, (iii) after July 1, 1984 (the effective date of this Act) recognized by an employer upon evidence, acceptable to the Board, that the labor organization has been designated as the exclusive representative by a majority of the employees in an appropriate bargaining unit; (iv) recognized as the exclusive representative of personal care attendants or personal assistants under Executive Order 2003-8 prior to the effective date of this amendatory Act of the 93rd General Assembly, and the organization shall be considered to be the exclusive representative of the personal care attendants or personal assistants as defined in this Section; or (v) recognized as the ex-

clusive representative of child and day care home providers, including licensed and license exempt providers, pursuant to an election held under Executive Order 2005-1 prior to the effective date of this amendatory Act of the 94th General Assembly, and the organization shall be considered to be the exclusive representative of the child and day care home providers as defined in this Section.

* * *

(g) "Fair share agreement" means an agreement between the employer and an employee organization under which all or any of the employees in a collective bargaining unit are required to pay their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and other conditions of employment, but not to exceed the amount of dues uniformly required of members. The amount certified by the exclusive representative shall not include any fees for contributions related to the election or support of any candidate for political office. Nothing in this subsection (g) shall preclude an employee from making voluntary political contributions in conjunction with his or her fair share payment.

* * *

(n) "Public employee" or "employee", for the purposes of this Act, means any individual employed by a public employer, including (i) interns and residents at public hospitals, (ii) as of the effective date of this amendatory Act of the 93rd General Assembly, but not before, personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, subject to the limitations set forth in this Act and in the Disabled Persons Reha-

bilitation Act, (iii) as of the effective date of this amendatory Act of the 94th General Assembly, but not before, child and day care home providers participating in the child care assistance program under Section 9A-11 of the Illinois Public Aid Code, subject to the limitations set forth in this Act and in Section 9A-11 of the Illinois Public Aid Code, (iv) as of January 29, 2013 (the effective date of Public Act 97-1158), but not before except as otherwise provided in this subsection (n), home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, no matter whether the State provides those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise . . ..

Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act shall not be considered public employees for any purposes not specifically provided for in Public Act 93-204 or Public Act 97-1158, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disa-

bled Persons Rehabilitation Act shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/).

Child and day care home providers shall not be considered public employees for any purposes not specifically provided for in this amendatory Act of the 94th General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Child and day care home providers shall not be covered by the State Employees Group Insurance Act of 1971.

5 Ill. Comp. Stat. 315/7. Duty to Bargain

A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.

For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

The duty "to bargain collectively" shall also include negotiations as to the terms of a collective bargaining agreement. The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois "Uniform Arbitration Act" unless agreed by the parties.

The duty "to bargain collectively" shall also mean that no party to a collective bargaining contract shall terminate or modify such contract, unless the party desiring such termination or modification: * * *

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization, which is a party to the contract, has been superseded as or ceased to be the exclusive representa-

tive of the employees pursuant to the provisions of subsection (a) of Section 9, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Collective bargaining for home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers under the Home Services Program shall be limited to the terms and conditions of employment under the State's control, as defined in Public Act 93-204 or this amendatory Act of the 97th General Assembly, as applicable.

Collective bargaining for child and day care home providers under the child care assistance program shall be limited to the terms and conditions of employment under the State's control, as defined in this amendatory Act of the 94th General Assembly.

Illinois Disabled Persons Rehabilitation Act (relevant sections only)

20 Ill. Comp. Stat. 2405/1. Purpose

It is the purpose of this Act to provide for rehabilitation, habilitation and other services to persons with one or more disabilities, their families and the community.

20 Ill. Comp. Stat. 2405/3(f). Powers and Duties

The Department shall have the powers and duties enumerated herein: * * *

(f) To establish a program of services to prevent unnecessary institutionalization of persons with Alzheimer's disease and related disorders or persons in need of long term care who are established as blind or disabled as defined by the Social Security Act, thereby enabling them to remain in their own homes or other living arrangements. Such preventive services may include, but are not limited to, any or all of the following:

(1) home health services;
(2) home nursing services;
(3) homemaker services;
(4) chore and housekeeping services;
(5) day care services;
(6) home-delivered meals;
(7) education in self-care;
(8) personal care services;
(9) adult day health services;
(10) habilitation services;
(11) respite care; or
(12) other nonmedical social services that may enable the person to become self-supporting.

The Department shall establish eligibility standards for such services taking into consideration the unique economic and social needs of the population for whom they are to be provided. Such eligibility standards may be based on the recipient's ability to pay for services; provided, however, that any portion

of a person's income that is equal to or less than the " protected income" level shall not be considered by the Department in determining eligibility. The "protected income" level shall be determined by the Department, shall never be less than the federal poverty standard, and shall be adjusted each year to reflect changes in the Consumer Price Index for All Urban Consumers as determined by the United States Department of Labor. The standards must provide that a person may have not more than $10,000 in assets to be eligible for the services, and the Department may increase the asset limitation by rule. Additionally, in determining the amount and nature of services for which a person may qualify, consideration shall not be given to the value of cash, property or other assets held in the name of the person's spouse pursuant to a written agreement dividing marital property into equal but separate shares or pursuant to a transfer of the person's interest in a home to his spouse, provided that the spouse's share of the marital property is not made available to the person seeking such services.

The services shall be provided to eligible persons to prevent unnecessary or premature institutionalization, to the extent that the cost of the services, together with the other personal maintenance expenses of the persons, are reasonably related to the standards established for care in a group facility appropriate to their condition. These non-institutional services, pilot projects or experimental facilities may be provided as part of or in addition to those authorized by federal law or those funded and administered by the Illinois Department on Aging. The Department shall set rates and fees for services in a fair

and equitable manner. Services identical to those offered by the Department on Aging shall be paid at the same rate.

Personal care attendants shall be paid:

(i) A $5 per hour minimum rate beginning July 1, 1995.

(ii) A $5.30 per hour minimum rate beginning July 1, 1997.

(iii) A $5.40 per hour minimum rate beginning July 1, 1998.

Solely for the purposes of coverage under the Illinois Public Labor Relations Act (5 ILCS 315/), personal care attendants and personal assistants providing services under the Department's Home Services Program shall be considered to be public employees, and the State of Illinois shall be considered to be their employer as of the effective date of this amendatory Act of the 93rd General Assembly, but not before. Solely for the purposes of coverage under the Illinois Public Labor Relations Act, home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also provide services under the Department's Home Services Program shall be considered to be public employees, no matter whether the State provides such services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise, and the State of Illinois shall be considered to be the employer of those persons as of the effective date of this amendatory Act of the 97th General Assembly, but not before except as otherwise provided under this subsection (f). The

State shall engage in collective bargaining with an exclusive representative of home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers working under the Home Services Program concerning their terms and conditions of employment that are within the State's control. Nothing in this paragraph shall be understood to limit the right of the persons receiving services defined in this Section to hire and fire home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers working under the Home Services Program or to supervise them within the limitations set by the Home Services Program. The State shall not be considered to be the employer of home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers working under the Home Services Program for any purposes not specifically provided in Public Act 93-204 or this amendatory Act of the 97th General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also provide services under the Department's Home Services Program shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/).

The Department shall execute, relative to the nursing home prescreening project, as authorized by Section 4.03 of the Illinois Act on the Aging, written in-

ter-agency agreements with the Department on Aging and the Department of Public Aid (now Department of Healthcare and Family Services), to effect the following: (i) intake procedures and common eligibility criteria for those persons who are receiving non-institutional services; and (ii) the establishment and development of non-institutional services in areas of the State where they are not currently available or are undeveloped. On and after July 1, 1996, all nursing home prescreenings for individuals 18 through 59 years of age shall be conducted by the Department.

The Department is authorized to establish a system of recipient cost- sharing for services provided under this Section. The cost-sharing shall be based upon the recipient's ability to pay for services, but in no case shall the recipient's share exceed the actual cost of the services provided. Protected income shall not be considered by the Department in its determination of the recipient's ability to pay a share of the cost of services. The level of cost-sharing shall be adjusted each year to reflect changes in the "protected income" level. The Department shall deduct from the recipient's share of the cost of services any money expended by the recipient for disability-related expenses.

* * *

Illinois Developmental Disability and Mental Disability Services Act (relevant sections only)

405 Ill. Comp. Stat. 80/2-2. Purpose

The purpose of this Article is to authorize the Department of Human Services to encourage, develop, sponsor and fund home-based and community-based services for mentally disabled adults in order to provide alternatives to institutionalization and to permit mentally disabled adults to remain in their own homes.

405 Ill. Comp. Stat. 80/2-3. Definitions

As used in this Article, unless the context requires otherwise:

(a) "Agency" means an agency or entity licensed by the Department pursuant to this Article or pursuant to the Community Residential Alternatives Licensing Act.

(b) "Department" means the Department of Human Services, as successor to the Department of Mental Health and Developmental Disabilities.

(c) "Home-based services" means services provided to a mentally disabled adult who lives in his or her own home. These services include but are not limited to:

(1) home health services;
(2) case management;
(3) crisis management;
(4) training and assistance in self-care;

(5) personal care services;
(6) habilitation and rehabilitation services;
(7) employment-related services;
(8) respite care; and
(9) other skill training that enables a person to become self-supporting.

(d) "Legal guardian" means a person appointed by a court of competent jurisdiction to exercise certain powers on behalf of a mentally disabled adult.

(e) "Mentally disabled adult" means a person over the age of 18 years who lives in his or her own home; who needs home-based services, but does not require 24-hour-a-day supervision; and who has one of the following conditions: severe autism, severe mental illness, a severe or profound intellectual disability, or severe and multiple impairments.

* * *

405 Ill. Comp. Stat. 80/2-4. Program

The Department shall establish a Home-Based Support Services Program for Mentally Disabled Adults ("the Program") under this Article. The purpose of the Program is to provide alternatives to institutionalization of mentally disabled adults and to permit these individuals to live in their own homes. The Department shall implement the purpose of the Program by providing home-based services to mentally disabled adults who need home-based services and who live in their own homes.

405 Ill. Comp. Stat. 80/2-6. Application

An application for the Program shall be submitted to the Department by the mentally disabled adult or, if the mentally disabled adult requires a guardian, by his or her legal guardian. If the application for participation in the Program is approved by the Department and the mentally disabled adult is eligible to receive services under this Article, the mentally disabled adult shall be made aware of the availability of a community support team and shall be offered case management services. The amount of the home-based services provided by the Department in any month shall be determined by the service plan of the mentally disabled adult, but in no case shall it be more than either:

(a) three hundred percent of the monthly federal Supplemental Security Income payment for an individual residing alone if the mentally disabled adult is not enrolled in a special education program by a local education agency, or

(b) two hundred percent of the monthly Supplemental Security Income payment for an individual residing alone if the mentally disabled adult is enrolled in a special education program by a local education agency.

Upon approval of the Department, all or part of the monthly amount approved for home-based services to participating adults may be used as a one-time or continuing payment to the eligible adult or the adult's parent or guardian to pay for specified tangible items that are directly related to meeting

basic needs related to the person's mental disabilities. Tangible items include, but are not limited to: adaptive equipment, medication not covered by third-party payments, nutritional supplements, and residential modifications.

405 Ill. Comp. Stat. 80/2-7. Service Providers

Services supported by this Article shall be offered by community health and developmental service providers which have been approved and designated by the Department.

RESPONDENT'S BRIEF

No. 11-681

In the
Supreme Court of the United States

PAMELA HARRIS, *et al.*,
PETITIONERS,

v.

PAT QUINN, in his official capacity as Governor of the State of Illinois, *et al.*,
RESPONDENTS.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT PAT QUINN

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's established First Amendment precedent to Illinois' regulatory scheme to hold that personal assistants providing home-based care to Medicaid recipients are public employees under Illinois law and thus may be required to pay their fair share of union representation.

2. Whether the court of appeals correctly held that other personal assistants do not have a ripe First Amendment claim because they are not represented by a union and do not pay any fair-share fees.

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BRIEF FOR RESPONDENT PAT QUINN

STATEMENT

1. Medicaid is a government program designed to provide access to medical care for those unable to afford it. 42 U.S.C. § 1396-1. It is administered by the States consistent with federal limitations and criteria. *Ibid.* Medicaid generally will pay the costs of caring for individuals who require continual or long-term care in institutions. 305 ILCS 5/5-5.5 (2012). The federal government also allows States to provide home-based medical services in lieu of institutionalization, but only if the costs of the services do not exceed those of institutionalized care. 42 U.S.C. § 1396n(c)(1), (c)(2)(D).

2. The Illinois General Assembly created the Home Services Program ("Program") to provide medical services to disabled adults under sixty years of age in a home-based setting "as a reasonable, lower-cost alternative" to institutional care. 305 ILCS 5/5-5a (2012); 89 Ill. Admin. Code § 682.100(d)-(e). The Program "enabl[es] [Medicaid-eligible individuals] to remain in their own homes," thus "prevent[ing] unnecessary or premature institutionalization." 20 ILCS 2405/3(f) (eff. Aug. 17, 2012). The Illinois Department of Human Services ("Department") calculates "the maximum amount that may be expended for services through the [Program] for an individual who chooses [home-care] services over institutionalization." 89 Ill. Admin. Code § 679.50(a).

Those who receive services under the Program are called "customers." *Id.* § 676.30(b). A Department-employed counselor develops a Service Plan for each customer, which the customer and counselor then sign, and the counselor submits the Plan to the customer's physician for approval. *Id.*

§§ 676.30(c), 684.10(a), 684.10(c). The Plan lists "all services to be provided to [the customer] through [the Program]," including "the type of service(s) to be provided * * *, the specific tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, [and] the rate of payment for the service(s)." *Id.* §§ 676.30(u), 684.10(a), 684.50. The State will pay only for the types and number of services permitted by the Plan. *Id.* §§ 676.200, 684.10(a).

"Personal assistants" perform many of the services outlined in the State-created Service Plan, including "household tasks, shopping, or personal care," "monitoring to ensure health and safety of the customer," and other "incidental health care tasks." *Id.* § 686.20. After the Department counselor assigned to the customer determines that the tasks in the Plan can be performed by a personal assistant, the customer may select one who meets the qualifications established by the State. *Id.* §§ 684.20, 684.30. Those qualifications include age and work-hour limits, pre-hire recommendations, and comparable experience and/or training. *Id.* § 686.10(b)-(c), (f). On request, the counselor must identify qualified candidates for the customer to interview. *Id.* § 684.20(b). The counselor also must evaluate the applicant's communication skills and ability to follow directions before any personal assistant is hired. *Id.* § 686.10(d)-(e).

Once the Department approves a personal assistant for hiring, both the customer and the assistant sign a Department-drafted agreement detailing the assistant's job responsibilities. *Id.* § 686.10(h). After hiring, the counselor helps the customer complete an annual review of the assistant, evaluating his or her

performance using metrics that include attendance, use of work time, accuracy of work, cleanliness, and responsibility and attitude toward the customer. *Id.* § 686.30(a)-(b). The counselor also works with the customer and personal assistant to resolve any conflicts, including by replacing the personal assistant if necessary. *Id.* § 686.30(c).

The State pays the personal assistants' salaries directly and withholds federal social security taxes and state and federal income taxes. *Id.* §§ 686.10(h)(10), 686.40(b). Customers neither pay their personal assistants, nor may they vary the wage rate established by the State. *Id.* § 676.200; 42 C.F.R. § 447.15. And "payment may only be made" to personal assistants who meet state standards. 89 Ill. Admin. Code § 677.40(d). The State may withhold funding (or disqualify a personal assistant from participating in the Program) if the customer is unable to manage the assistant, the assistant engages in neglect, abuse, or financial exploitation, or there is fraud or other violation of Program policies. See Ill. Dep't of Human Servs., Customer Guidance for Managing Providers, at 8, available at http://www.dhs.state.il.us/OneNetLibrary/27897/documents/Brochures/4365.pdf.

3. The Illinois Public Labor Relations Act ("IPLRA") authorizes certain state employees to join unions and bargain collectively with their public employer, through an elected representative, "on questions of wages, hours, and other conditions of employment." 5 ILCS 315/6(a) (2012). The IPLRA also gives employees the right, by majority vote, to reject representation entirely. *Id.* 315/9(d). A collective bargaining agreement between a public employer and

the exclusive representative of its employees may require "employees covered by the agreement who are not members of the [union] to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." *Id.* 315/6(e). The public employer collects these "fair share" fees and remits them to the union, *ibid.*, which must "represent[] the interests of all public employees in [a bargaining] unit," *id.* 315/6(d).

4. Throughout the 1970s and into the early 1980s, home care services in Illinois were provided by state workers classified as "Homemaker[s]," whose duties included "laundry, grocery shopping, dressing, grooming and routine household chores" for Medicaid recipients. *State of Ill. (Dep'ts of Cent. Mgmt. Servs. & Rehab. Servs.)*, No. S-RC-115, 2 PERI ¶ 2007, 1985 WL 1144994, at *10 (Dec. 18, 1985). The State engaged in collective bargaining with a representative of these workers over the terms and conditions of their employment. *Ibid.*

In the mid-1980s, a few years after the Program was established, personal assistants sought to unionize and engage in collective bargaining with the State under the IPLRA. Pet. App. 4a. A hearing officer with the State Labor Relations Board found that the State and the customers are "joint employers" of the personal assistants, because each has "the 'right to control' different but essential elements of the employment relationship." *State of Ill. (Dep'ts of Cent. Mgmt. Servs. & Rehab. Servs.)*, 1985 WL 1144994, at *11-*12. The hearing officer also held, however, that the IPLRA did not allow the Board to assert jurisdiction "in a joint employment situation where it has jurisdiction over

only one employer." *Id.* at *12. The State Labor Relations Board "agree[d]" with the Hearing Officer that it lacked jurisdiction, "[w]ithout reaching the specific conclusions of the Hearing Officer as to the joint employer status." *Id.* at *1. The Board determined that the State "does not exercise the type of control over the petitioned-for employees necessary to be considered, in the collective bargaining context envisioned by the [IPLRA], their 'employer' or, at least, their sole employer." *Id.* at *2.

In 2003, the Illinois Governor issued an executive order allowing a majority of personal assistants to designate an exclusive representative with "all the rights and duties granted such representatives by the [IPLRA]." Pet. App. 46a-47a. The Governor explained that each customer "employs only one or two personal assistants," "does not control the economic terms of their employment under the [Program,] and therefore cannot effectively address concerns common to all personal assistants." Pet. App. 46a. Because negotiation with the assistants is "essential" for the State to "effectively and efficiently deliver home services," the Governor adopted a model previously used on an informal basis in Illinois and "successfully * * * implemented * * * in other states." *Ibid.* The Governor directed the State to recognize an exclusive representative if a majority of the assistants designated one and to engage in collective bargaining over the State-controlled employment terms. Pet. App. 46a-47a.

A few months later, the Illinois General Assembly codified that executive order by amending the IPLRA and the Disabled Persons Rehabilitation Act, 20 ILCS 2405/1 *et seq.* (2012), to provide that "[s]olely for the purposes of coverage under the [IPLRA]," "personal

assistants providing services under the Department's Home Services Program shall be considered to be public employees and the State of Illinois shall be considered to be their employer." Pet. App. 40a-41a, 43a-44a. Personal assistants are not public employees for other purposes, including "vicarious liability in tort and * * * statutory retirement or health insurance benefits." Pet. App. 42a, 44a.

Later that year,"a majority of the approximately 20,000" personal assistants in the Program "voted to designate" Service Employees International Union Healthcare Illinois & Indiana ("SEIU") as their collective bargaining representative. Pet. App. 4a.[1] The State entered into a collective bargaining agreement with SEIU in August 2003, D.Ct. Dkt. 32-5, a renewed agreement in 2008, J.A. 35-60, and a third agreement in 2012.[2]

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[1] The State designated SEIU the exclusive representative after adding the number of personal assistants who, payroll records showed, already were dues-paying members of SEIU to the number of additional personal assistants on whose behalf SEIU submitted signed membership cards. The total number showed that a majority wanted to be represented by SEIU. See Letter from Benno Weisberg, Ill. Dep't of Cent. Mgmt. Servs., to Justin Hegy, Ill. Policy Institute (Nov. 21, 2013), available at http://illinoispolicy.org/wp-content /uploads/2013/11/WeisbergLetter.pdf. Thus, amici's statement that "Rehabilitation Providers never had an opportunity to vote on whether to join the union," Ill. Policy Inst. Br. 10 n.6, is misleading.

[2] The most recent collective bargaining agreement is available at http://www2.illinois.gov/cms/Employees/ Personnel/Documents/emp_seiupast.pdf.

5. The 2003 agreement (like both subsequent agreements) provided for wage increases (from $7.00 per hour in 2003 to $13.00 per hour beginning in 2014), and it created a joint union-state committee to develop training programs and study health and safety issues, required the State to provide safety gloves for the personal assistants' protection, established a grievance procedure to resolve disputes over the agreement's meaning and implementation, and included a no-strike provision. D.Ct. Dkt. 32-5 (Arts. VII, IX, XI, XII § 5); 2012 CBA (Art. VII § 1).

The 2008 agreement provided the personal assistants with state-funded health insurance coverage, allocated $2 million for personal assistant training, and established a joint committee to form a personal assistant referral registry. J.A. 44 (Art. VII § 2(a)); J.A. 47 (Art. IX § 1); J.A. 57-58 (Side Letter).

And the 2012 agreement required that all newly hired assistants complete a "comprehensive orientation" to the Program, and that all assistants submit to background checks and undergo an annual in-person training program with State-determined "courses and curricula." 2012 CBA (Art. XI § 1 & Side Letter 2). The 2012 CBA also restructured the State's contributions to the health benefit fund to more accurately reflect the cost of providing health insurance coverage. 2012 CBA (Art. VII § 2). Finally, all three agreements provide customers with the "sole right to supervise, terminate and/or discipline Personal Assistants" but reserve to the State "the right to condition any future funding based on credible allegations concerning Customer welfare or safety," "includ[ing] but not limited to, credible allegations of abuse, neglect or financial exploitation of a Customer by

a Personal Assistant." *E.g.*, J.A. 55 (Art. XII § 6). In such circumstances, the State may restrict the employment of the personal assistant or monitor the services provided. *Ibid.*

The agreements also require the State to deduct union dues and membership fees from the wages of union members "[u]pon receipt * * * of written authorization from the Personal Assistant," and to deduct from the wages of non-members "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." *E.g.*, J.A. 49-51 (Art. X §§ 5-6).

6. Petitioners, who include personal assistants in the Program, sued the union and Illinois Governor Pat Quinn, alleging that the deduction of fair-share fees from their paychecks violated the First Amendment. J.A. 30 (¶ 46); see also J.A. 33. They did not allege, however, that "the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining." Pet. App. 7a.

The district court dismissed the complaint, holding that the fair-share fees did not "impose[ ] any burden on [petitioners] beyond supporting the collective bargaining arrangement from which they benefit." Pet. App. 35a. Petitioners did not allege that the "fair share fees * * * are used to support any political or ideological activities." *Ibid.* The district court thus concluded that the fees are "constitutional under * * * longstanding Supreme Court precedent." *Ibid.*

7. Noting that "the constitutional claim in this appeal is confined to the payment or potential payment

of the fair share requirement," Pet. App. 5a n.2, the Seventh Circuit affirmed in a unanimous decision. The court began by "set[ting] out the controlling precedent"—*Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—which hold that, "as a general matter, employees may be compelled [through fair-share fees] to support legitimate, non-ideological union activities germane to collective-bargaining representation." Pet. App. 7a-9a. The Seventh Circuit thus "consider[ed] whether the personal assistants are * * * State employees," which it did by measuring the degree to which the State "exercise[s] * * * control over" them. Pet. App. 9a, 10a.

After reviewing the pertinent Illinois regulations, the court concluded that "the State does have significant control over virtually every aspect of a personal assistant's job." Pet. App. 10a. Specifically, the court found that: "the State sets the qualifications and evaluates the patient's choice" of assistant; "the State may effectively [fire personal assistants] by refusing payment for services provided by personal assistants who do not meet the State's standards"; "[w]hen it comes to controlling the day-to-day work of a personal assistant, the State exercises its control by approving a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions and annually reviews each personal assistant's performance"; and "the State controls all of the economic aspects of employment: it sets salaries and work hours, pays for training, and pays all wages—twice a month, directly to the personal assistants after withholding federal and state taxes." Pet. App. 10a-11a. Because the State was the personal

assistants' employer, "the interests identified by the Court in *Abood* are identical to those advanced by the State in this case." Pet. App. 13a.

The Seventh Circuit also "stress[ed] the narrowness of [its] decision," which turns on the court's finding that personal assistants qualify as state employees "for purposes of applying *Abood*" only because of the significant control the State exercises over their employment. *Ibid.* Given this finding, the Seventh Circuit had "no reason to consider whether the State's interests in labor relations justify mandatory fees outside the employment context," including "whether *Abood* would still control if the personal assistants were properly labeled independent contractors" and "whether and how a state might force union representation for other health care providers who are not state employees." *Ibid.*

8. Illinois also hires personal assistants to care for disabled adults under the Home Based Support Services Program ("Support Services Program"). 405 ILCS 80/2-1 *et seq.* (2012); see also 59 Ill. Admin. Code §§ 117.100-117.240. In 2009, the Governor issued an executive order authorizing the State to bargain with a representative elected by the personal assistants in the Support Services Program. D.Ct. Dkt. 32-3. In October 2009, the State Labor Relations Board supervised a mail-ballot election in which two rival unions competed to become the representative of the Support Services providers. J.A. 26 ¶ 32. These personal assistants voted against representation, J.A. 27 ¶ 36, and thus are not represented by a union or covered by a collective bargaining agreement.

Petitioners' complaint alleged that the State nevertheless had violated these personal assistants' First Amendment rights by threatening to enter into an agreement that might require them to pay fair-share fees. J.A. 31 ¶ 48. Because the Support Services Program petitioners have never paid fair-share fees, however, the district court held that they had not suffered an injury sufficient to confer standing. Pet. App. 38a-39a. The Seventh Circuit agreed, noting that these petitioners had alleged no specific injury, but merely that the executive order increased the likelihood that they would suffer a future violation of their rights. Pet. App. 15a. The court held that this claim was not ripe because "courts cannot judge a hypothetical future violation * * * any more than they can judge the validity of a not-yet enacted law." Pet. App. 16a.

SUMMARY OF ARGUMENT

Illinois permits Medicaid recipients who would otherwise be institutionalized to live in their own homes where possible, with the help of state-paid "personal assistants." Given the intimate nature of the services provided, the State gives these customers discretion when choosing an assistant. To protect the customers' health and safety and to avoid fraud, however, the State retains control over the assistants' qualifications, training, hours, responsibilities, salary, and benefits. And to effectively coordinate with this widely dispersed workforce, the State gives the personal assistants the option to elect a union to negotiate with the State over the many employment terms and conditions within the State's control. Negotiations have so far resulted in agreements providing for, among other things, orientation and annual training, a committee on health and safety issues, a personal assistant referral registry, a grievance procedure, health insurance coverage, and salary increases. This cooperation between the State and the union, the Illinois legislature concluded, is the best way to ensure a workforce that will meet the needs of the State's most vulnerable residents in a professional and cost-effective manner.

Petitioners seek to remove collective bargaining from the options available to the government employer—not only in the present circumstances but in all others—by asking this Court to overrule one of its cases (*Abood*) and implicitly suggesting that it overrule others. The Court should reject this request. Public and private employers have relied for eighty years on their ability to structure employment relationships through systems of exclusive representation and fair-share fees. And if *stare decisis* principles alone are

insufficient to sustain decisions upholding these systems, the decisions should be reaffirmed on their merits, because they reach the correct balance between First Amendment rights and the government's interests as employer.

I. *Abood* is in step with cases (such as *Garcetti* and *Engquist*) that weigh the public employee's right to speak freely against the government's interest in promoting efficiency and professionalism in its workforce. But rather than treating government employers more like their private-sector counterparts, as these cases require, petitioners claim robust First Amendment protections that trump the countervailing government interests in a well-managed workforce.

Nor can *Abood* be isolated from decisions upholding compelled payments not only in the employment context (such as *Lehnert* and *Locke*) but also in the context of bar association fees (*Keller*), agricultural cooperatives (*Glickman*), and student activity fees (*Southworth*). These cases establish that the government may compel financial support for cooperative activity, so long as the support serves a legitimate government purpose and is limited to a proportionate share of the costs germane to that purpose. And because Illinois deducts union dues only with express authorization from the personal assistants, this case presents no question regarding the propriety of employees being required to opt out.

II. Petitioners' new argument that exclusive representation alone violates the First Amendment is foreclosed by *Knight*. Petitioners are not required to join a union, and the designation of an exclusive

representative does not interfere with their right to speak or to petition government.

III. The proper test for determining whether *Abood* applies asks whether the State has sufficient control over the employment relationship to make collective bargaining meaningful, which in turn promotes the government's interest in peaceful and productive labor relations. Petitioners' alternative test would ignore this important government interest.

IV. Illinois' relationship with the personal assistants satisfies the control test. The State sets the hiring criteria and evaluates each customer's choice of assistant, provides an orientation and annual training, controls the assistants' hours and job responsibilities, attends annual reviews and effectively may fire any assistant who does not meet state standards, and sets and pays the assistants' salary and benefits. That the customers have discretion in choosing their assistant and supervise that assistant's performance of State-designated tasks reflects the State's efforts to preserve customer autonomy whenever possible, but it does not diminish the State's interests in the effective provision of services.

V. Lastly, as to the personal assistants who voted against unionization and are neither represented by a union nor pay fair-share fees, their claim is not ripe for judicial review.

ARGUMENT

I. *Abood* Was Properly Decided, And Its Holding Is Compelled By Several Lines Of Authority.

Petitioners challenge a "general First Amendment principle"—that government may require "both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative * * * to pay that union a service fee" so long as the union does not "charge the nonmember for certain activities, such as political or ideological activities." *Locke v. Karass*, 555 U.S. 207, 213 (2009). Specifically, petitioners claim that the inclusion of "public sector" employees in the foregoing rule is the fault of one decision, *Abood*, which the Court should now abandon.

As an initial matter, petitioners' request to overturn *Abood* is not properly before the Court. Petitioners failed to preserve this claim in either the district court or the Seventh Circuit. Nor did they raise it in their certiorari petition or reply, even after the Governor flagged the fact in his brief in opposition. Rather, petitioners argued that the lower courts had *misapplied Abood*. See, *e.g.*, Pet. 19; Pet. App. 13a, 29a; Pet. Reply 1-3, 5, 7. Indeed, petitioners did not signal any interest in overturning *Abood* even when, after *Knox v. SIEU, Local 1000*, 132 S. Ct. 2277 (2013), was decided, they responded to the United States' certiorari-stage brief. See, *e.g.*, Supp. Br. 1, 7. Waiting until their merits brief in this Court was too late. See S. Ct. R. 14.1(a); *Thornton v. United States*, 541 U.S. 615, 624 n.4 (2004) (plurality op.); see also *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-213 (1998); *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997).

In any event, *Abood* is not the outlier petitioners describe, for it follows inexorably from other First Amendment decisions, this Court has applied its constitutional analysis in a variety of non-labor contexts, and it is in step with *Engquist*, *Garcetti*, and other cases recognizing limits on the constitutional rights of public employees. Even if petitioners could establish some exception to *stare decisis* applicable to *Abood* alone (and they cannot), they fail to acknowledge the many lines of this Court's precedent they seek to unsettle, much less attempt to reconcile such a profound reordering with *stare decisis* principles.

A. *Abood* Followed From *Hanson* And *Street*.

In *Hanson*, this Court upheld Congress' power to authorize a private railroad company to enter into a "union-shop" agreement, which required employees to join the union as a condition of employment. 351 U.S. at 238. The Court determined that "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar," and Congress sufficiently protected these rights by limiting the conditions of compulsory union membership to the payment of dues. *Id.* at 236, 238. The Court concluded, therefore, that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work"—nonmembers who might otherwise free ride on this work—"does not violate" the Constitution. *Id.* at 238.

In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Court again acknowledged that unions have a "clearly defined and delineated role to

play in effectuating the basic congressional policy of stabilizing labor relations in the industry." *Id.* at 760. Performance of a union's statutory duties "entails the expenditure of considerable funds," and the union's position as exclusive bargaining representative "carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion." *Id.* at 760-761. The Court thus upheld union shop agreements, notwithstanding their intrusion on employees' "freedom of choice," "for the limited purpose of eliminating problems created by the 'free rider.'" *Id.* at 767.

Abood elaborated on the government interests advanced by negotiating with an exclusive representative of its employees: avoiding the confusion and demands of negotiating and enforcing two or more agreements; preventing inter-union and union-nonunion rivalries; and ensuring that employees benefit from collectivization. See 431 U.S. at 220-221. The Court also described the duties of the exclusive representative: "negotiating and administering a collective-bargaining agreement"; representing "'union and nonunion'" "employees in settling disputes and processing grievances"; and other "great responsibilities" requiring "the services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." *Id.* at 221. These burdens are exacerbated by the fact that unions must fairly represent the interests of *all* bargaining unit members, union and non-union alike. See *ibid.* Fair-share fees "distribute fairly the cost of these activities among those who benefit" and counteract "the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union

while obtaining benefits of union representation." *Id.* at 222.

Once again, the Court recognized that compulsory financial support for a union impacts employees' First Amendment interests. See *ibid.* But as the Court held in *Hanson* and *Street*, that impact is justified "by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Ibid.* *Abood* thus balanced the employees' First Amendment interests with the need to compel financial support for the bargaining representative, who by law must work for all employees, and held that the required fair-share fees cannot be used to support political candidates and express political views unrelated to the performance of collective bargaining. See *id.* at 234.

This balance of public and individual interests is the same, the Court recognized, whether the employer is the government or a private entity, for the "desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller." *Id.* at 224. The government interests that support "the impingement upon associational freedom created by the" union shop in the private sector are equally "important" in the public sector. *Id.* at 225. And the individual interests in avoiding fair-share fees are no "weightier" in the private sector. *Id.* at 229. In this sense, "[p]ublic employees are not basically different from private employees." *Ibid.* Both "may find that a variety of union activities conflict with their beliefs." *Id.* at 231. That the employer is the government, whose activities "may be properly termed political," "does not raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees." *Ibid.*

B. *Hanson* And *Street* Are First Amendment Decisions.

In their effort to convince the Court that it can overturn *Abood* surgically, without any impact on other precedent, petitioners begin with the claim that *Hanson* and *Street* did not, in fact, address First Amendment claims. See Pet. Br. 19-20. But this is false, as the decisions themselves and subsequent cases make clear.

In *Hanson*, the Nebraska Supreme Court had held that the Railway Labor Act was unenforceable because it violated the First (and Fifth) Amendments. See 351 U.S. at 230; see also *Hanson v. Union Pac. Ry. Co.*, 71 N.W.2d 526, 546-547 (Neb. 1955). This Court agreed that "questions under the First and Fifth Amendments were presented." 351 U.S. at 231. And, after considering and rejecting a Commerce Clause challenge, the Court addressed the allegations of "[w]ide-ranged [First Amendment] problems." *Id.* at 236. Rejecting these arguments, the Court held that compulsory union membership, like membership in an integrated bar, "does not violate * * * the First * * * Amendment[]." *Id.* at 236, 238. Indeed, when the Court stated that questions of "freedom of expression" were "not presented by this record," *id.* at 238 (quoted at Pet. Br. 19), it was merely acknowledging the lack of evidence that the plaintiff employees were required to do anything other than pay dues toward the union's collective-bargaining activities.

Likewise, *Street* characterized *Hanson* as having held that compulsory union membership "d[oes] not violate the First Amendment." 367 U.S. at 746. Then, to avoid the First Amendment problem the Georgia Supreme Court had identified in the case, this Court in

Street interpreted federal law to prohibit unions from using fair-share fees for "political causes." *Id.* at 749 (contrary interpretation would raise "serious doubt of their constitutionality").

Petitioners not only mischaracterize *Hanson* and *Street*, but they also seek to rewrite the many decisions that rely on these cases for their First Amendment analysis. See *Lathrop v. Donohue*, 367 U.S. 820, 842 (1961) (compulsory union membership does not "abridge protected rights of association," citing *Hanson*); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. Allen*, 373 U.S. 113, 117-118 (1963) (compulsory union membership does "not violate the First Amendment," citing *Hanson* and *Street*); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers & Station Emps.*, 466 U.S. 435, 455-456 (1984) ("[i]t has long been settled that such interference with First Amendment rights [from being required to finance a collective bargaining agent] is justified by the governmental interest in industrial peace," citing *Hanson*, *Street*, and *Abood*); *Chic. Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302 n.8 (1986) ("[e]arlier cases had construed the Railway Labor Act to permit a similar arrangement [for fair-share fees toward collective-bargaining costs] without violating the Constitution," citing *Hanson*, *Street*, and *Abood*).

Consistent with these decisions, every Member of the Court in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), agreed that *Hanson* addressed and rejected a First Amendment challenge. See *id.* at 515 ("[T]he Court [in *Hanson*] determined that the challenged arrangement did not offend First * * * Amendment values."); *id.* at 552 (Scalia, *J.*,

concurring in the judgment in part and dissenting in part) ("In * * * *Hanson* * * *, we upheld the federal union shop provision * * * against a First Amendment challenge."). And just four years ago, a unanimous Court in *Locke* reiterated in no uncertain terms that in "*Hanson*, *Street*, and *Abood*, the Court set forth a general First Amendment principle" when these decisions upheld the constitutionality of fair-share fees as a condition of private and public employment. 555 U.S. at 213.

C. The Court Has Relied On *Abood*'s First Amendment Analysis In Non-Labor Settings As Well.

Not only does *Abood* follow directly from this Court's prior First Amendment holdings, but the Court has applied *Abood*'s constitutional analysis in other contexts as well. The Court has held more generally, for example, that the First Amendment does not preclude the government from compelling financial support for "cooperative activity," so long as that support serves a "legitimate" government purpose and is limited to a proportionate share of the costs germane to the "overriding associational purpose which allow[ed the] compelled subsidy for speech in the first place." *United States v. United Foods, Inc.*, 533 U.S. 405, 413, 414 (2001). In these circumstances, the compelled support is a "logical concomitant of a valid scheme of economic regulation" and therefore is permissible. *Id.* at 412.

Keller v. State Bar of California, 496 U.S. 1 (1990), thus upheld the requirement that all attorneys pay membership dues to the State Bar for use on activities "germane" to "the State's interest in regulating the legal profession and improving the quality of legal

services." *Id.* at 13-14. It was "entirely appropriate," the Court explained, "that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Id.* at 12. Because all lawyers benefitted from the State Bar's activities, there was "a substantial analogy between the relationship of the State Bar and its members * * * and the relationship of employee unions and their members," even though State Bar members "do not benefit as directly from its activities as do employees from union negotiations with management." *Ibid.*

Similarly, *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997), upheld "marketing orders" requiring California tree-fruit producers to contribute to the cost of advertising as part of a comprehensive regulatory program. See *id.* at 460, 461, 469. As the Court explained, there is no "broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities." *Id.* at 471. Rather, "assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group." *Id.* at 472-473. Thus, as in *Abood* and *Keller*, the assessments were lawful because "the generic advertising * * * [was] unquestionably germane to the purposes of the marketing orders." *Id.* at 473.[3]

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[3] In *United Foods*, this Court reaffirmed *Abood*, *Keller*, and *Glickman* but held that their rationale did not extend to the program there because it did "not require group action, save to generate the very speech to which some handlers object." 533 U.S. at 415. Because the State here instituted a system

And *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), upheld a public university's assessment of student activity fees even though it was "all but inevitable that the fees [would] result in subsidies to speech which some students find objectionable and offensive to their personal beliefs." *Id.* at 232. The university had "important" and "significant interests" in "facilitat[ing] a wide range of speech," and a refund system could "be so disruptive and expensive" as to render "ineffective" "the program to support extracurricular speech." *Id.* at 231, 232, 234.

D. Petitioners Would Abolish The Long-Held Distinction Between Government As Regulator And Government As Employer.

Petitioners implicitly challenge yet another line of this Court's jurisprudence. Underlying their effort to overrule *Abood* is the premise that employees speaking to their public employers are "lobbyists" engaged in core political speech, even when these employees are negotiating over the basic terms of their employment; therefore, the argument runs, public employees enjoy robust First Amendment protections that trump the employer's interest in promoting efficiency and professionalism in the workforce. See Pet. Br. 23, 38,

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of collective bargaining not merely to obtain "'feedback'" from the personal assistants—and thus not, contrary to petitioners' argument, solely to generate speech, see Pet. Br. 43, but to "effectively and efficiently deliver home services" through structured negotiations and a binding contract, Pet. App. 46a—petitioners' argument (at Pet. Br. 43) that the Court should reach the same result here as in *United Foods* is misplaced.

40, 42 n.12, 49; Amicus Br. of Ctr. for Const. Jurisprudence 2, 11-15; Amicus Br. of Cal. Pub.-Sch. Teachers 7-13.

But as petitioners themselves acknowledge elsewhere in their brief (at pp. 24-25), this Court has "long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage [its] internal operation." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (internal quotations omitted; alteration in original); see also *NASA v. Nelson*, 131 S. Ct. 746, 757-758 (2011). And this difference "has been particularly clear in [the Court's] review of state action in the context of public employment." *Engquist*, 553 U.S. at 598. "'[G]overnment offices could not function if every employment decision became a constitutional matter,'" and therefore "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Id.* at 599 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)); see also *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, *J.*, concurring) ("[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."). In this respect, a public employer more closely resembles its private-sector counterpart, for "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

The Court's "public employee speech cases are particularly instructive" in this regard. *Engquist*, 553 U.S. at 599. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). And given "the nature of the government's mission as employer," "constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality op.). There must be "a balance between the interests" of the employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," including its need to promote "harmony among coworkers." *Pickering*, 391 U.S. at 568, 570.

The result is that, in the First Amendment context, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418; see also *Waters*, 511 U.S. at 672 (plurality op.) ("the practical realities of government employment" give rise to "many situations in which * * * most observers would agree that the government must be able to restrict its employees' speech") (emphasis omitted). Specifically, "[w]hen a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011). And even then, courts still

"balance the First Amendment interest of the employee against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* (internal quotations omitted).

In practice, this means that public employees frequently lack First Amendment protection for speech related to the terms of their employment. See *id.* at 2496 (acknowledging need to avoid constitutionalizing employee "grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations"); *id.* at 2506 ("When an employee files a petition with the government in its capacity as his employer, he is not acting as [a] citize[n] for First Amendment purposes, because there is no relevant analogue to [petitions] by citizens who are not government employees.") (Scalia, *J.*, concurring in judgment in part and dissenting in part) (internal quotations omitted; alterations in original); *Connick*, 461 U.S. at 148, 155 (holding that there was no protection for speech regarding office policies that included "need for a grievance committee" and fairness of "office procedure regarding transfers").

Petitioners and their amici seek to upset this "delicate balance." *Engquist*, 553 U.S. at 607. Under their proposed rule, employee speech directed to a public employer—including communications that merely "implicate employment conditions," Amicus Br. of Cal. Pub.-Sch. Teachers 11—enjoys First Amendment protection that supercedes the interest in a well-managed public workforce. Far from treating the government employer more like its private-sector counterparts, petitioners and their amici thus invite the Court to draw a sharp distinction between the two. See

Pet. Br. 23, 29; Amicus Br. of Cal. Pub.-Sch. Teachers 11; Amicus Br. of Ctr. for Const. Jurisprudence 13-14. Indeed, it is impossible to reconcile petitioners' claim that all collective employee speech with a government employer is political and worthy of heightened First Amendment protection with *Connick*, *Garcetti*, *Engquist*, and the other cases in this line.

Relatedly, petitioners err in claiming that there is no principled distinction between "lobbying" a public sector employer, on the one hand, and "bargaining" with that employer, on the other. See Pet. Br. 21-23. Since *Abood*, this Court has reaffirmed that distinction repeatedly. Thus, in *Lehnert*, every member of the Court agreed that there is a sound basis for differentiating between the two. See 500 U.S. at 519 (setting forth test); *id.* at 553 (offering alternative test, whereby "the state interest that can justify mandatory dues arises solely from the union's statutory duties") (Scalia, *J.*, joined by O'Connor, Souter, and Kennedy, *JJ.*, dissenting). And in *Knox*, the Court reaffirmed "the important difference between a union's authority to engage in collective bargaining and related activities on behalf of nonmember employees in a bargaining unit and the union's use of nonmember's money to support candidates for public office or to support political causes which [they] oppos[e]." 132 S. Ct. at 2294 (internal quotations omitted; alterations in original). No Member of the Court suggested that this "important difference" is actually illusory, and petitioners' claim that there is no real distinction cannot be squared with these decisions.

It also ignores the courts' proven ability to draw an analogous line between public employee communication that "touch[es] upon a matter of public concern," and

other employee speech. *Connick*, 461 U.S. at 147. "To be sure, conducting these inquiries sometimes has proved difficult." *Garcetti*, 547 U.S. at 418. But an alternative that treats all communication by public employees as political speech or First Amendment "petitioning"—as petitioners invite the Court to do here—would elevate "'the interests of the [employee], as a citizen, in commenting upon matters of public concern,'" to the exclusion of the government's interest, "'as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 140 (quoting *Pickering*, 391 U.S. at 568) (brackets in original). The line courts successfully draw in applying *Connick* and *Garcetti* is no less principled, and no more essential, than the one courts have drawn for decades under *Abood*.

E. *Abood* And Related Lines Of Decision Are Entitled To *Stare Decisis* Effect.

Adherence to principles of *stare decisis* accomplishes several goals—it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (quotation marks and citations omitted). And respecting precedent, even on constitutional questions, is particularly important if, as here, a decision "has become settled through iteration and reiteration over a long period of time." *Id.* at 244; see also *Dickerson v. United States*, 530 U.S. 428, 443-444 (2000); *Quill Corp. v. N.D. By & Through Heitkamp*, 504 U.S. 298, 316-317 (1992).

Abood was decided more than three decades ago, and this Court has reaffirmed its holding repeatedly, including recently in *Locke*. See 555 U.S. at 210, 213-214; see also *supra* pp. 20-21. And as the foregoing sections make clear, overturning *Abood* would implicate a whole host of the Court's First Amendment decisions as well as decades of jurisprudence distinguishing between the government as regulator and the government as employer. See *Welch v. Tx. Dep't of Highways*, 483 U.S. 468, 494 (1987) (if "Court were to overrule these precedents, a number of other major decisions also would have to be reconsidered").

Such a monumental reordering would not satisfy any of the criteria that sometimes favor a departure from *stare decisis*. The rule at issue has not become unworkable in practice. And far from identifying any changed circumstances, petitioners and their amici press arguments almost identical to those presented and rejected in *Abood* itself. Finally, in the thirty-plus years since *Abood*, public-sector unions and government employers have relied on the decision to order their affairs and engage in collective bargaining, just as government employers have relied on *Connick*, *Garcetti*, and *Engquist* to promote efficiency and professionalism in the public workplace. See Brief Amicus Curiae of the States of New York, *et al.*; Brief Amicus Curiae of the States of Washington, *et al.*

II. Exclusive Representation Alone Does Not Violate The First Amendment.

In their rush to overrule *Abood*, petitioners raise yet another new argument—that the State's decision to negotiate exclusively with the union chosen by a majority of personal assistants *alone* violates the First

Amendment. See, *e.g.*, Pet. Br. 23, 30, 37. In fact, petitioners now insist that merely "put[ting] to a vote" the question of exclusive representation violates their First Amendment rights. Pet. Br. 58. This argument was not raised in the complaint or the courts below, or in the certiorari petition, and it therefore is not properly before the Court. See *supra* p. 15. In any event, holding that the First Amendment prohibits government from authorizing systems of exclusive representation in the public sector would require the Court to overrule far more than *Abood*.

Most obviously, the Court would have to overturn its decision in *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271 (1984), which petitioners acknowledge, see Pet. Br. 46-47 & n.15, but whose holding they ignore. By summary affirmance, *Knight* sustained a state law granting public employees the right to negotiate through their exclusive representative over issues subject to collective bargaining. See 465 U.S. at 279. The Court then held that the grant of exclusive authority to the union to "meet and confer" with the State about "questions of policy" not subject to mandatory bargaining did not violate the First Amendment, either. *Id.* at 274, 280. The case thus presented the precise question petitioners ask the Court to decide here (as if for the first time)—whether the First Amendment prohibits a system allowing public employees to elect an exclusive bargaining representative. Declining to work a "massive intrusion into state and federal policymaking," *id.* at 285, the Court held that the system did not even "infringe[] * * * any First Amendment right," *id.* at 291.

This was true for several reasons. The government's decision to negotiate with an exclusive

representative did not interfere with nonmembers' rights to speak or petition government on their own. See *id.* at 280-282; accord *Lehnert*, 500 U.S. at 521 (plurality op.) ("Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace."); *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 176 n.10 (1976) (nonunion members may use public forums to "communicate [their] views directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands").

And because the government "in no way restrained [the plaintiffs'] freedom to speak," their First Amendment challenge to exclusive representation reduced to a claim that "government is constitutionally obligated to listen to [them]." *Knight*, 465 U.S. at 282, 288. But *Knight* properly rejected this argument as well: "A person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* at 288; see also *Smith v. Ark. State Highway Emps. Local 1315*, 441 U.S. 463, 464-465 (1979) (*per curiam*). The Court likewise rejected the plaintiffs' claims that their "associational freedom ha[d] been impaired" by the recognition of an exclusive representative. *Knight*, 465 U.S. at 289. Employees were not required to become union members, and they remained "free to form whatever advocacy groups they" wished. *Ibid.*

Petitioners' only response to *Knight* is to insist that "claims of compelled association were not at issue there." Pet. Br. 47 n.15. But the compelled association claim that was "not at issue" related to the fair-share fees, which the plaintiffs had not challenged. *Knight*,

465 U.S. at 289 n.11; see also *id.* at 291 n.13. In contrast, the Court squarely held that exclusive representation alone does not implicate the First Amendment, even where (unlike here) the representation covered "questions of policy" not subject to collective bargaining, *id.* at 276, and in a case (unlike this one) where the First Amendment rights asserted arose in an academic setting and thus were "especially worthy of respect," *id.* at 297 (Brennan, *J.*, dissenting).

Beyond *Knight*, this case is in line with the many decisions that begin from the premise that exclusive representation is constitutional. These include, for example, the Court's decision upholding the constitutionality of a school district rule limiting access to faculty mailboxes to the teachers' exclusive representative. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 50-52 (1983). Likewise, the Court's many decisions fine-tuning the circumstances under which a union may recover expenses "incurred for the purpose of performing [its] duties [as] an exclusive representative," *Ellis*, 466 U.S. at 448, would not exist if exclusive representation violated the First Amendment outright, see also *Locke*, 555 U.S. at 217-218; *Lehnert*, 500 U.S. at 519; *Hudson*, 475 U.S. at 301-302.

Like the public employees in these cases, petitioners need not become members of a union. See 5 ILCS 315/6(a) (2012). And state law protects them from discrimination for declining to join. See 5 ILCS 315/10(a)(2) (2012). They remain free "to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media," as well as to the government in public

forums. *Madison*, 429 U.S. at 176 n.10. Accordingly, petitioners' reliance on cases addressing claims of compelled association is misplaced. See Pet. Br. 17 (citing, *e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)).

Moreover, *Knight* rejects the very arguments petitioners advance in support of their theory. Petitioners argue that exclusive representation impermissibly interferes with the "'open marketplace'" of ideas by giving the union "a monopoly in expressing its views.'" Pet. Br. 26. But the Court in *Knight* saw no constitutional problem with the fact that exclusivity gave the union an "amplifie[d] * * * voice in the policymaking process." 465 U.S. at 288. As the Court explained, "[a]mplification of the sort claimed is inherent in government's freedom to choose its advisors." *Ibid.* Similarly, petitioners complain about being denied "'a meaningful dialogue with [their] employer,'" Pet. Br. 30, yet in *Knight* this Court held that there is "no constitutional right to be heard on policy questions," 465 U.S. at 290 n.12. Likewise, *Knight* rejected petitioners' claim that exclusive representation has "conscript[ed]" them "into the Union's ranks." Pet. Br. 47. Petitioners need not join the union, and, as *Knight* explained, any pressure they might feel to do so is no different from "the pressure to join a majority party that persons in the minority always feel" and "does not create an unconstitutional inhibition on associational freedom." 465 U.S. at 290.

III. Petitioners' Proposal To Limit *Abood* Ignores Vital Government Interests.

As an alternative to overruling *Abood*, petitioners ask to limit that decision "to its facts." Pet. Br. 24. But this is a thinly veiled second effort at overturning *Abood*, one that requires the Court to adopt a First Amendment test with no basis in law or common sense. The proper test (which the Seventh Circuit applied below) ensures that the State has sufficient control over the employment relationship to make collective bargaining meaningful, thereby promoting the government's interest in peaceful and productive labor relations.

A. Collective Bargaining Serves Critical Government Interests.

Federal and state laws authorizing employees to organize and bargain collectively are a "legitimate" means to facilitate "industrial peace and stabilized labor-management relations." *Hanson*, 351 U.S. at 233-234. Insufficient training, poor morale, excessive absenteeism, lack of productivity, high turnover rates, worker shortages, or any combination thereof undercut the State's ability to provide needed services effectively and efficiently. Collective bargaining creates a structure for employers and employees to negotiate the terms and conditions of employment, determine a mix of benefits that will attract and retain workers, and resolve disputes quickly and equitably. "The theory of [collective bargaining] is that [a] free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the [law] in itself does not attempt to compel." *NLRB v.*

Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); see also *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 735 (1981). This Court has "accorded great weight to the [legislative] judgment" regarding when collective bargaining is appropriate. *Hudson*, 475 U.S. at 301 n.8; see also *Abood*, 431 U.S. at 229.

The government thus has a legitimate interest in encouraging meaningful collective bargaining as a means of facilitating coordination and cooperation in employment relationships, and the "designation of a single representative" to negotiate with an employer over the terms and conditions of employment advances this interest. *Abood*, 431 U.S. at 220, 221, 224; see also *Hudson*, 475 U.S. at 301 n.8 (recognizing "important 'principle of exclusive union representation'"); *Ellis*, 466 U.S. at 455-456 ("by allowing the union shop," government furthers its "interest in industrial peace"). Exclusive representation "avoids the confusion that would result from attempting to enforce two or more agreements," "prevents inter-union rivalries from creating dissension within the workforce," "frees the employer from the possibility of facing conflicting demands from different unions," and "permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Abood*, 431 U.S. at 220-221; see also *Knight*, 465 U.S. at 291 ("The goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.'").

And the government's interest in bargaining with an exclusive representative in turn creates the need to avoid free riders—those who would "refuse to contribute to the union while obtaining the benefits of

union representation that necessarily accrue to all employees." *Abood*, 431 U.S. at 222. The "designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Id.* at 221. Requiring all employees to contribute "distribute[s] fairly the cost of these activities among those who benefit, and * * * counteracts the incentive that employees might otherwise have to become 'free riders.'" *Id.* at 222. The two interests are inseparable—having adopted a system of collective bargaining through an exclusive representative, with all the benefits of that system, government may "'constitutionally require that the costs of improving the [program] in this fashion should be shared by the subjects and beneficiaries.'" *Keller*, 496 U.S. at 8 (quoting *Lathrop*, 367 U.S. at 842-843).

B. Where The State Is The Employer, It Exercises Sufficient Control To Make Collective Bargaining Meaningful.

"[N]either *Hanson* nor *Abood* discusses the definition of employer"—that is, neither defines the nature of the relationship between the government and its workers needed to trigger the foregoing, constitutionally sufficient interest in bargaining with an exclusive representative. Pet. App. 10a. The Seventh Circuit thus "assume[d] the Court meant to give the word [employer] its ordinary meaning: 'A person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages.'" *Ibid.* (quoting BLACK'S LAW DICTIONARY). And this reliance on the extent of

employer control is the essence of the common-law definition of an employment relationship, which exists where the hiring party has the "right to control the manner and means by which" a worker performs the job. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); see also Restatement (Second) of Agency § 220, cmt. d (1958).

When "asked to construe the meaning of 'employee,'" this Court frequently "adopt[s] [this] common-law test." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992); see, *e.g.*, *id.* at 323; *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 448 (2003); *Reid*, 490 U.S. at 739-751. Indeed, following this Court's lead, both the National Labor Relations Board and lower courts apply "general agency principles" to define the universe of workers to whom the National Labor Relations Act extends the right to organize and bargain collectively. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

Moreover, the common-law test has special purchase here. Because it turns on the degree of employer control over the terms and conditions of employment, it finds an employment relationship only where collective bargaining would be meaningful. Without sufficient control over the terms of employment, bargaining may be an empty exercise. But where, as here, the employer exerts control over salary and benefits (including health insurance), qualifications, training, and other core elements of the relationship, see *supra* pp. 1-3, 7-8, collective bargaining is most able to promote the government's interest in maintaining a stable and professional workforce. And because the State's relationship with the personal assistants so readily satisfies the common-law test, the Court need

not decide whether a collective bargaining regime would be valid in some cases without a common-law employment relationship. See *Keller*, 496 U.S. at 12, 15-16 (compelled payments to mandatory association permissible outside of employment context); see also *NASA*, 131 S. Ct. at 758-759.

Petitioners argue that the common-law test is "ill-suited for First Amendment line drawing," seemingly because it considers multiple factors, "none of which is determinative." Pet. Br. 32 n.8. But "totality of the circumstances" tests are not unusual in constitutional adjudication, see, *e.g.*, *Florida v. Harris*, 133 S. Ct. 1050, 1055-1056 (2013), including in the First Amendment context, see *Garcetti*, 547 U.S. at 424 (determining whether public employee spoke pursuant to official duties, and thus within scope of First Amendment protections, requires "practical" inquiry); *id.* at 436 (Souter, *J.*, dissenting) (describing majority's "totality of the circumstances" test).

Relying on *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), petitioners also suggest that a common-law employment relationship is irrelevant to the scope of First Amendment protections. See Pet. Br. 31-32. But see *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 673 (1996) (interest balancing that determines scope of First Amendment must be "adjusted to weigh the government's interest as contractor rather than as employer"). Again, however, the existence of such a relationship indicates the presence of sufficient control for meaningful collective bargaining, thus facilitating the government's interest in maintaining a productive workforce through peaceful labor relations. Moreover, *O'Hare* was an application of the prohibition against political patronage—recognized

by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976), see 518 U.S. at 725-726—and *Abood* specifically rejected the argument that "fair-share" provisions are "governed by * * * decisions" (including *Elrod*) "holding that public employment cannot be conditioned upon the surrender of First Amendment rights," 431 U.S. at 226. The Court held that so long as objectors are not required to contribute "toward the advancement of * * * ideological causes not germane to [the union's] duties as collective-bargaining representative," fair-share fees do not present the same First Amendment questions at issue in cases like *Elrod*. *Id.* at 235.

Finally, petitioners fault the Seventh Circuit's reliance on the "joint employment concept." Pet. Br. 32. But joint employment is a familiar feature of the common law, *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (describing "hornbook rule" that "a 'person *may* be the servant of two masters . . . *at one time as to one act*'") (quoting Restatement (Second) of Agency § 226 (1958)) (ellipses and emphasis in original); *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (under common law, worker "could be deemed to be acting for two masters simultaneously"), as well as labor relations law, see *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (employer may "possess[] sufficient control over the work of the employees to qualify as a joint employer" under National Labor Relations Act); *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982) (where two employers "share or co-determine those matters governing essential terms and conditions of employment," "they constitute 'joint employers' within the meaning of the NLRA"). And the Seventh Circuit, consistent with the common-law test, held that the State and the customers would qualify as

joint employers only if "*each* exercise[s] significant control over the personal assistants." Pet. App. 10a (emphasis added). Whether the State is an employer or a joint employer, the dispositive question is whether the State exercises sufficient control over its workers to make collective bargaining a meaningful way to promote a stable and professional workforce.

C. Petitioners' Test Relies On An Artificially Narrow Interpretation Of The Government's Labor Peace Interest.

Rather than asking whether the government exercises sufficient control over the employment relationship to engage in meaningful collective bargaining, petitioners would limit *Abood* to circumstances where (1) "the government is actively managing and supervising the affected individuals in its workplaces," and (2) "the representation does not extend to matters of public concern." Pet. Br. 24. But petitioners' novel test fails to account for the government's interests in facilitating peaceful labor relations and, relatedly, avoiding free riders.

As an initial matter, there is no reasonable definition of "actively manag[e]" that the State does not satisfy here: it sets the hiring criteria and evaluates each customer's choice of assistant, designs and implements the assistants' orientation and training, attends annual reviews and effectively may fire any assistant who does not meet the State's standards, controls the assistants' hours and job responsibilities, and sets and pays their salaries and benefits.

Nor can it be that the State's interest turns on whether it supervises its employees in government-owned buildings, a claim that precedes

from petitioners' absurdly cramped view of the labor peace rationale. See, *e.g.*, Pet. Br. 25. As the Seventh Circuit recognized in rejecting this same argument, this Court held long before *Abood* that "'[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex' and a question of policy outside of the judiciary's concern." Pet. App. 12a (quoting *Hanson*, 351 U.S. at 234). Relying on *Hanson*, the court below saw that *Abood* used the shorthand "labor peace" "to include 'stabilized labor management relations,' which are at issue in any employer-employee relationship." *Ibid.*

In fact, the State's interest in promoting labor stability is particularly acute here, for the Illinois General Assembly established the Home Services Program to provide critical services to the State's most vulnerable citizens in a cost-effective manner. "Without a reliable workforce to deliver quality care, homecare services fail and the burden falls on expensive residential care facilities and on families." C. Howes, *Living Wages & Retention of Homecare Workers in San Francisco*, INDUS. RELATIONS, Vol. 44, No. 1, at 142 (2005). High turnover, low morale, excessive absenteeism, poor training, or lack of productivity would impede the State's efforts to keep customers in their own homes. See *id.* at 143 ("The average duration of matches between a consumer and provider is * * * an important measure of stability and quality of care[.]"). Collective bargaining provides an effective means for the State to coordinate with the personal assistants to determine the combination of benefits that will attract and retain qualified workers, and to quickly resolve any disputes that may arise.

The first element of petitioners' proposed test is therefore nonsensical, for the government's interest in the efficient and effective delivery of services does not diminish merely because the State has decided to respect customers' personal autonomy by allowing them to supervise personal assistants directly and at home. In fact, the government's labor peace interest is *greater* in these circumstances. Because each customer employs only one or two personal assistants, and has no control over the economic terms of their employment, the customer "cannot effectively address concerns common to all personal assistants." Pet. App. 46a. And because the personal assistants are not in a centralized workplace, they have no opportunity to "effectively voice their concerns" to the State about the terms and conditions of their employment. *Ibid.* Collective bargaining facilitates cooperation and coordination between the personal assistants and their public employer.

Moreover, many common topics of collective bargaining that are critical to worker satisfaction and productivity—including wages, health and retirement benefits, training and safety, and discipline and grievance procedures—are the same regardless of whether the government directly supervises the affected employees or whether they work in government-owned workplaces. Indeed, petitioners' argument would eliminate collective bargaining for huge classes of public employees who necessarily work outside a centralized government workplace, including bus drivers, police officers, and sanitation workers.

And even if—contrary to this Court's past decisions—the definition of "labor peace" could be limited merely to avoiding "multiple representatives,"

Pet. Br. 25, petitioners' proposed test still ignores reality. The government's interest in preventing "inter-union rivalries" and reaching a binding agreement with a single union, see *supra* Sec. III.A, does not depend on the employees' location or whether they are directly supervised. Although "proof" of "past disturbances" is unnecessary to invoke the labor peace rationale, *Perry*, 460 U.S. at 52 n.12, the contest between the two unions to represent assistants in Illinois' Support Services Program is evidence that "inter-union rivalries" may arise even when employees are widely dispersed. See *Waters*, 511 U.S. at 673 (plurality op.) ("[W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is a matter of public concern.").

Nor, finally, are this Court's decisions affording substantial deference to the government as employer irrelevant here because—as petitioners contend—"virtually all" involve "a workplace setting where the government directly and actively supervised the employee." Pet. Br. 28. This Court has specifically rejected the argument "that the government interests in maintaining harmonious working environments and relationships" are too "attenuated" to warrant consideration "where the contractor does not work at the government's workplace and does not interact daily with government officers and employees." *Umbehr*, 518 U.S. at 677. The government's "interests as a public service provider, including its interest in being free from intensive judicial supervision of its daily management functions, are potentially implicated" when it acts as contractor just as when it acts as employer. *Id.* at 678. "Deference is therefore due to the government's

reasonable assessments of its interests *as contractor*." *Ibid.* (emphasis in original); see also *NASA*, 131 S. Ct. at 759 (whether employment relationship exists "says very little about the interests at stake in this case"). Indeed, while overturning *Abood* would throw decisions like *Engquist*, *Connick*, and *Garcetti* into doubt, limiting *Abood* as petitioners propose would vastly curtail the effect of these decisions, to the peril of public employers.

The second prong of petitioners' proposed test—that exclusive representation "not extend to matters of public concern"—is equally misguided. As petitioners use the term, "matters of public concern" encompasses every element of public-sector collective bargaining. See Pet. Br. 30, 38, 40-42. But this explodes the settled distinction between the government as regulator and the government as employer. See *supra* Sec. I.D. The government's interest as employer "in promoting the efficiency of the government services it performs through its employees" has long enjoyed substantial deference even with regard to employee speech and petitioning on matters of public concern. *Borough of Duryea*, 131 S. Ct. at 2493 (internal quotations omitted). The second prong of petitioners' proposed test also is impossible to reconcile with *Abood*, *Lehnert*, and *Knox*, each of which confirmed that there is a constitutional "line between permissible assessments for public-sector collective bargaining activities and prohibited assessments for ideological activities." *Lehnert*, 500 U.S. at 517; see also *supra* p. 27. Petitioners' test thus reduces to a request to overrule these cases *sub silentio* and hold that a public-sector union's use of fair-share fees, even for collective bargaining activities, is prohibited.

D. Avoiding Free-Riding Is A Vital Government Interest.

Not only do petitioners understate the importance of the government labor peace interest at stake, but they also wrongly urge the Court to "disavow the free-rider argument entirely." Pet. Br. 34. The Court's recognition of that legitimate government interest in *Abood* was not the historical accident petitioners depict, however. Rather, for over half a century, both Congress and this Court have recognized the important social interest in curbing free riding, and they have balanced the harms it causes with employees' constitutional rights. See *supra* Secs. I.A-C; see, *e.g.*, *Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. NLRB*, 347 U.S. 17, 41 (1954).

Nor has the Court limited its reliance on the free-rider rationale to the context of collective bargaining. Just as *Hanson* predicted, see 351 U.S. at 238, this Court has found "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Keller*, 496 U.S. at 12. "It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Ibid.* And the Court subsequently relied on *Abood* and *Keller* to uphold a law requiring growers, handlers, and processors of California tree fruit to finance a generic advertising campaign. *Glickman*, 521 U.S. at 471-473.

Petitioners place significant weight on dicta in *Knox* that acceptance of the free-rider justification in the

union-shop context is "'something of an anomaly.'" Pet. Br. 34 (quoting 132 S. Ct. at 2289). Yet they ignore this Court's longstanding acknowledgment of the special importance of free-riding concerns in the context of collective bargaining, starting with *Hanson*. *Knox* itself recognized the Court's settled rule that "compelling nonmembers to pay a portion of union dues" is "justified by the interest in furthering 'labor peace.'" 132 S. Ct. at 2290 (quoting *Hudson*, 475 U.S. at 303). And *Knox* was clear that it left intact that bedrock principle of American labor law. See *id.* at 2289.

In any event, the compelled association with political advocacy challenged in *Knox* is a far cry from the anti-free-riding measure here. To be sure, both implicate First Amendment rights. See *Ellis*, 466 U.S. at 455. The former treads on core First Amendment protections, however, while the latter does not, and the dissenters' First Amendment interest was therefore greater in *Knox*. At the same time, the government's interest is far more powerful here, where free riders would threaten the State's ability to bargain with a single, exclusive representative of its employees.

As Justice Scalia explained in *Lehnert*, "What is distinctive * * * about the 'free riders' who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." 500 U.S. at 556 (Scalia, *J.*, concurring in part and dissenting in part) (emphasis in original); see also *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 750 (1988) (in absence of union-shop agreements, unions "were legally obligated to represent the interests of all workers, including those who did not

become members[;] thus nonunion workers were able, at no expense to themselves, to share in all the benefits the unions obtained through collective bargaining"); *Street*, 367 U.S. at 762 ("Benefits resulting from collective bargaining may not be withheld from employees because they are not "members of the union.") (internal quotations omitted). "Thus, the free ridership (if it were left to be that) would not be incidental but calculated, not imposed by circumstances but mandated by government decree." *Lehnert*, 500 U.S. at 556 (Scalia, *J.*, concurring in part and dissenting in part).

Because exclusive bargaining representatives are forced to carry nonmembers and expend significant resources on activities (including contract negotiation and grievance processing) that benefit nonmembers, the union-shop context is different from the examples in *Knox* where the free-rider argument does not prevail. See 132 S. Ct. at 2289-2290. Accordingly, in the union context, the result of permitting free riders would not only be to force union members to subsidize bargaining and dispute resolution on behalf of non-paying employees, but to do so using the part of union dues that exceed the members' own fair-share portion—the part that union members *intended* the union to use for core political speech.

Finally, it bears noting that the book review on which the *Knox* dicta relies, see 132 S. Ct. at 2289-2290 (quoting Clyde W. Summers, Book Review, SHELDON LEADER, FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW & POLITICAL THEORY, 16 COMPARATIVE LABOR L.J. 262, 268 (1995)), did not indict the free rider argument. Rather, the passage *Knox* quoted was illustrating the weakness of the book's defense of that argument. See

Summers, *supra*, at 268. In fact, Professor Summers' ultimate conclusion supports respondents: "The free rider argument has a special force when unions are involved because unions have a special role in a democratic free market society. Such a society relies on collective bargaining to help regulate the labor market, protect rights of employees, and provide a measure of industrial democracy." *Id.* at 272.

IV. The Seventh Circuit Correctly Held That Petitioners Are State Employees For Purposes Of *Abood*.

The personal assistants are employees of the State within the common-law definition. The State exercises significant control over the terms of their employment, and—even if narrow tailoring were required—the Illinois law that petitioners challenge would satisfy this standard. Finally, given the extensive control the State exerts over the personal assistants, petitioners' claim that affirming the decision below will give rise to the unionization of vast groups of non-similarly situated workers is misplaced.

A. The State Controls Many Of The Terms And Conditions Of Employment.

The State exercises substantial "control" over the personal assistants. *Reid*, 490 U.S. at 751-752 (setting forth factors of common-law employment relationship). The State decides which services a personal assistant may provide. 89 Ill. Admin. Code § 686.20. A State-employed counselor develops a Service Plan for each customer that lists "the specific tasks" each personal assistant will perform, "the frequency" with which the assistant must perform them, and "the number of hours" per month the personal assistant may

spend on each task. *Id.* §§ 676.30(u), 684.10(a), 684.50. All personal assistants must participate in an annual State-designed training program and submit to background checks. 2012 CBA (Side Letter 2). And the State-employed counselor helps the customer undertake an annual performance review of each personal assistant and "mediate[s]" "unresolved issues" between the customer and the assistant, including (if needed) by replacing the assistant. 89 Ill. Admin. Code § 686.30.

Because the State-created Service Plan dictates the tasks a personal assistant will perform and the time allowed for each task, the State also exercises "discretion over when and how long" each assistant works. *Reid*, 490 U.S. at 751. And because the State only pays for services listed in the Service Plan unless the counselor approves additional services, 89 Ill. Admin. Code §§ 676.200, 684.10(a), 686.10(h)(2), the State alone has the "right to assign additional projects" to the personal assistant, *Reid*, 490 U.S. at 751. The State also provides safety gloves, which can be critical to the personal assistants' well being, 2012 CBA Art. IX § 2, and is therefore "the source" of at least some of "the instrumentalities and tools" of the job, *Reid*, 490 U.S. at 751.

Moreover, the State exercises sole control over "paying" personal assistants, the "method" by which they are paid, their "tax treatment," and the "provision of employee benefits." *Id.* at 751-752. The State alone determines the personal assistants' wages and pays them directly. 89 Ill. Admin. Code §§ 676.200, 686.40(a)-(b); 42 C.F.R. § 447.15. The State withholds Social Security tax and all state and federal income taxes. 89 Ill. Admin. Code § 686.10(h)(10). And the

State pays to train the assistants and funds their health insurance. 2012 CBA Arts. VII § 2, IX § 1.

In addition, the State exercises significant control over the "hiring" of each personal assistant. *Reid*, 490 U.S. at 751-752. A customer cannot decide to hire an assistant without the State-employed counselor's approval, 89 Ill. Admin. Code § 684.20(a) ("[t]he counselor has the responsibility to identify the appropriate level of service provider"), and, on the customer's request, the counselor must identify qualified candidates, *id.* § 684.20(b). Prior to hiring, moreover, any applicant must meet State-imposed standards, including age and work-hour limits, pre-hire recommendations, and documented comparable experience and/or training, and also must demonstrate communication skills and the ability to follow directions to the counselor's satisfaction. *Id.* § 686.10(b)-(f). All new hires must complete a "comprehensive orientation" program designed by the State. 2012 CBA (Art. IX § 1 & Side Letter 2). And the State may fire personal assistants by refusing to pay for their services if they do not meet state standards. 89 Ill. Admin. Code § 677.40(d). Moreover, the State may refuse to pay for (or disqualify from the Program) personal assistants if there are credible allegations of customer neglect, abuse, or financial exploitation. See 2012 CBA (Art. XII § 6).

It is no surprise, therefore, that the Illinois Workers' Compensation Commission has consistently held, applying the common-law test, that personal assistants are state employees for purposes of the state Worker's Compensation Act. See *Marketoe Day v. Illinois*, No. 07 W.C. 6544, No. 09 I.W.C.C. 0708, 2009 WL 2488458, at *5 (Ill. Indus. Comm'n July 10, 2009);

see also *Bauer v. Indus. Comm'n*, 282 N.E.2d 448, 450 (Ill. 1972) (common-law test determines coverage under Illinois Worker's Compensation Act). The Commission relied on the fact that the State "determined the extent of [the customer's] needs"; "controlled [the personal assistant's] salary [and] number of hours he was permitted to work each week"; "provided training"; "required [the personal assistant] to provide background information and references"; "informed [the personal assistant] he would not be entitled to pay for [certain activities]," even if requested by the customer; and "reserved the right to terminate [the personal assistant's] pay in the event of evidence of fraud, abuse or neglect or in the event of a determination that [the customer] no longer required home care." *Martin v. Illinois*, No. 04 W.C. 31542, No. 05 I.W.C.C. 0580, 2005 WL 2267733, at *5 (Ill. W.C.C. July 26, 2005).

Finally, as the court below recognized, see Pet. App. 10a-11a, a customer enjoys discretion to choose any personal assistant meeting state standards, 89 Ill. Admin. Code § 684.20(b). And the customer is responsible for supervising the personal assistant's performance of State-designated tasks within the time the State sets for performance, and may discipline and even terminate the assistant. *Id.* § 676.30(b). Moreover, because the Program exists as an alternative to institutionalization, "the location of the work," *Reid*, 490 U.S. at 751, is the customer's home, 89 Ill. Admin. Code § 676.10(a), and the customer may supply additional "instrumentalities and tools," *Reid*, 490 U.S. at 751. But these are only a few of the factors relevant to deciding whether a common-law employment relationship exists. "'[A]ll of the incidents of the

relationship must be assessed and weighed with no one factor being decisive.'" *Darden*, 503 U.S. at 324 (quoting *United Ins.*, 390 U.S. at 258).

Nor was the Seventh Circuit's application of the common-law test "flawed on its own terms." Pet. Br. 44-45. Here, petitioners quote Illinois regulations providing, *inter alia*, that the "'customer shall serve as the [personal assistant's] employer'" and the Department has no "'control'" over "'the employment relationship between the customer and the personal assistants.'" *Ibid.* (emphasis omitted). But the Seventh Circuit correctly recognized that the label affixed by the State is insufficient to establish (or disestablish) an employment relationship. See Pet. App. 9a. Instead, the court below properly "consider[ed] the relationship itself" when deciding that the State has sufficient control over the personal assistants to qualify as their employer. *Ibid.*

Petitioners also nit-pick the Seventh Circuit's phrasing of the regulations, noting that the customer's physician (not the Department-employed counselor) must provide final approval for any Service Plan, and that the counselor does not conduct the annual performance review alone. See Pet. Br. 45. But these misstatements—if they can be called that—are inconsequential: the counselor *develops* the Service Plan before submitting it to the customer's physician for approval, and the counselor *assists* the customer with each performance review and mediates any unresolved issues, including by replacing the assistant. See *supra* pp. 1-3. Notably, petitioners do not contest the other ways in which the State exerts control over the personal assistants' job.

Nor, finally, does the Illinois Labor Relations Board's 1985 decision indicate that customers employ the personal assistants to the exclusion of the State, as petitioners contend (at p. 45). "Without reaching" the hearing officer's finding that the State and the customers are "joint employers" of the personal assistants, the State Board merely held that it lacked statutory authority in joint employment situations (unless both employers were subject to Board jurisdiction), see *supra* pp. 4-5—an interpretation of state law the Board since has rejected, see, *e.g.*, *AFSCME, Council 31*, No. S-RC-05-126, 23 PERI ¶ 71, 2007 WL 7562292, at *1 (Apr. 23, 2007).

B. The State Need Not Show Narrow Tailoring, And No Less Restrictive Means Are Available In Any Event.

Petitioners also contend (at pp. 46-48) that the State's system of collective bargaining flunks constitutional scrutiny because there are more narrowly tailored means (meet-and-confer arrangements, administrative rulemaking, and polls) to serve the State's interest in facilitating a stable and productive workforce. Because the State's system is subject to a balancing analysis in lieu of strict scrutiny, however, see *supra* Secs. I.A-D, the State need not show that collective bargaining is the least restrictive means of facilitating the Program's goals. And regardless of the applicable level of scrutiny, this Court already "determined that the First Amendment burdens accompanying [fair-share] payment requirement[s] are justified by the government's interest in preventing freeriding * * * and in maintaining peaceful labor relations," *Locke*, 555 U.S. at 213, in cases where the alternatives petitioners propose here were equally

available. Even Justice Powell, in the concurring opinion in *Abood* on which petitioners place such weight (at pp. 21-23), indicated that fair-share fees in the public sector may well survive strict scrutiny if, as here, they are used for bargaining over "narrowly defined legal issues" (such as salaries and benefits) and certain non-bargaining activities (such as "[t]he processing of individual grievances"). 431 U.S. at 263 n.16.

Moreover, empirical evidence shows that collective bargaining is more effective than its alternatives. Collective bargaining does not rely on individual, dispersed workers without the wherewithal to collaborate effectively. Thus, studies indicate that unionized caregivers in Illinois, specifically, are likely to obtain more training and worker's compensation than their non-unionized counterparts. See E.T. Powers & N.J. Powers, *Should Government Subsidize Caregiver Wages? Some Evidence on Worker Turnover & the Cost of Long-Term Care in Group Homes for Persons with Developmental Disabilities*, JOURNAL OF DISABILITY POLICY STUDIES, Vol. 21, No. 4, Tables 4-5 & p. 204 (2011). "These findings [are] consistent with unions playing important information-provision and policing roles." *Id.* at 206-207. And studies show that unionization of homecare workers is associated with increased compensation and retention, and retention is one of the most important indicia of quality of care. See Howes, *supra*, at 139-140, 143; see also E.T. Powers & N.J. Powers, *Causes of Caregiver Turnover & the Potential Effectiveness of Wage Subsidies for Solving the Long-Term Care Workforce 'Crisis'*, B.E. JOURNAL OF ECONOMIC ANALYSIS & POLICY (CONTRIBUTIONS), Vol.

10, No. 1, at 23 (2010).[4] As a result, collective bargaining uniquely facilitates the cooperation between the public employer and the personal assistants necessary to determine workforce preferences and provide quality home care as a cost-effective alternative to institutionalization.

Finally, only by misleadingly describing the State's argument and the opinion below can petitioners claim that "[i]f upheld," the Seventh Circuit's decision "will open the door to the collectivization" of "almost anyone receiving government money for a service." Pet. Br. 49, 51. Consistent with the State's argument and the opinion below, "individuals who provide services to public-aid recipients," Pet. Br. 49, may be required to pay fair-share fees in exchange for reaping the benefits of collective bargaining only if they *also* are subject to "significant [government] control" over the terms and conditions of their employment, Pet. App. 10a. For this reason, the Seventh Circuit did not address whether its "narrow[]" decision extended to Support Services Program providers (whose "exact relationship" with the State was not "developed"), Pet. App. 3a & n.1, 17a, or to "contractors, health care providers, or citizens," Pet. App. 13a. Accordingly, the First Amendment implications of requiring workers other than the Home Services Program personal assistants to pay fair-share

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[4] Powers & Powers studied direct service providers in Illinois group homes for the developmentally disabled. These workers and their counterparts in the Program share similar job responsibilities. See Powers & Powers, *Causes of Caregiver Turnover*, *supra*, at 1. Thus, workers attracted to both positions are likely similar in their characteristics and expected responses.

fees—including all workers described by petitioners, see Pet. Br. 51-55, and those covered by amendments to Illinois law that post-date petitioners' complaint, see 5 ILCS 315/3(n), (o); 20 ILCS 2405/3(f) (eff. Jan. 29, 2013)—are not presented by this case.

V. A Constitutional Challenge To A Hypothetical, Future Fair-Share Agreement Is Not Ripe For Judicial Review.

The Support Services Program personal assistants "have opted not to have union representation." Pet. App. 14a. The question whether their unionization would violate the Constitution therefore is not ripe for judicial review.

A mere "hypothetical threat" is not an injury ripe for adjudication. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 90 (1947). Here, it is merely "hypothetical" that the Support Services Program personal assistants will select a bargaining representative. Shortly after the executive order, these personal assistants voted *against* union representation. J.A. 26-27 (¶¶ 32-36). In the intervening four years, there have been no new votes. Nor have there been any indications that the assistants wish to revisit their initial vote, let alone reverse it. Under analogous circumstances, this Court has repeatedly recognized that a constitutional challenge is not ripe. See, *e.g.*, *Texas v. United States*, 523 U.S. 296, 300-301 (1998); *Renne v. Geary*, 501 U.S. 312, 321 (1991).

In effect, petitioners seek an advisory opinion declaring that *if* the personal assistants choose a collective bargaining representative at some point, the First Amendment will preclude that representative from either negotiating on their behalf or collecting fair-share

fees from them. But "[p]laintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013) (quotations omitted).

The great weight petitioners place on this Court's observation that "'one does not have to await the consummation of threatened injury to obtain preventative relief'" is misplaced. Pet. Br. 56 (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)). This principle applies only where the purported harm is imminent or inevitable, see, *e.g.*, *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 144 (1974), whereas petitioners' claim "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all," *Texas*, 523 U.S. at 300 (internal quotations and citation omitted).

A showing of imminent harm is unnecessary only where a collateral injury, distinct from the harm that formed the basis of the suit, is either present or inevitable. See, *e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754-2755 (2010). Petitioners' allegation that if there were a future vote, "they must expend resources to encourage other providers to vote any union down," Pet. Br. 56, does not qualify as such a collateral harm. Regardless, as the Seventh Circuit explained below, a party's expenditure of resources to sway the results of an election is not an injury by itself. Pet. App. 16a. Otherwise, the mere proposal of every new piece of legislation would establish a justiciable injury for those who oppose it. *Ibid.*

Prudential considerations also favor leaving petitioners' constitutional arguments unaddressed, for

there is no "hardship to the parties" in "withholding court consideration," and the issues are not "fit[] * * * for judicial decision." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

Petitioners will suffer no hardship if judicial resolution of their constitutional claim is postponed. The executive order has no immediate impact on them or their interests. See *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58-59 (1993) (speculative whether regulations would deny legalized status to any plaintiff); see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999). If the Support Services Program personal assistants select a collective bargaining representative, these petitioners would be free to request a preliminary injunction or declaratory judgment from a federal district court. See *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998).

Nor is the question petitioners seek to adjudicate appropriate for resolution at this time, for it does not turn entirely on a question of law. To prevail, they must persuade the Court that the specific relationships these personal assistants have with customers are such that the State no longer has a sufficient interest in labor peace among these workers to justify even the modest First Amendment impingement permitted by *Abood*. The potential First Amendment question, therefore, turns on factual considerations regarding the amount of control Illinois exercises over the Support Services Program personal assistants. These issues are better considered in the context of a particular collective bargaining agreement, not a theoretical one.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted.

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Appendix A

Illinois Public Labor Relations Act (relevant sections)

315/6. Right to organize and bargain collectively; exclusive representation; and fair share arrangements

§6. Right to organize and bargain collectively; exclusive representation; and fair share arrangements.

(a) Employees of the State and any political subdivision of the State, excluding employees of the General Assembly of the State of Illinois and employees excluded from the definition of "public employee" under subsection (n) of Section 3 of this Act, have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment, not excluded by Section 4 of this Act, and to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion. Employees also have, and are protected in the exercise of, the right to refrain from participating in any such concerted activities. Employees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages,

hours and other conditions of employment as defined in Section 3(g).

(b) Nothing in this Act prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of an employee organization; provided that the exclusive bargaining representative is afforded the opportunity to be present at such conference and that any settlement made shall not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative.

(c) A labor organization designated by the Board as the representative of the majority of public employees in an appropriate unit in accordance with the procedures herein or recognized by a public employer as the representative of the majority of public employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act. A public employer is required upon request to furnish the exclusive bargaining representative with a complete list of the names and addresses of the public employees in the bargaining unit, provided that a public employer shall not be required to furnish such a list more than once per payroll period. The exclusive bargaining representative shall use the list exclusively for bargaining representation purposes and shall not disclose any information contained in the list for any other purpose. Nothing in this Section, however, shall prohibit a bargaining representative from disseminating a list of its union members.

(d) Labor organizations recognized by a public employer as the exclusive representative or so designated in accordance with the provisions of this Act are responsible for representing the interests of all public employees in the unit. Nothing herein shall be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious.

(e) When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, as defined in Section 3 (g), but not to exceed the amount of dues uniformly required of members. The organization shall certify to the employer the amount constituting each nonmember employee's proportionate share which shall not exceed dues uniformly required of members. In such case, the proportionate share payment in this Section shall be deducted by the employer from the earnings of the nonmember employees and paid to the employee organization.

(f) Only the exclusive representative may negotiate provisions in a collective bargaining agreement providing for the payroll deduction of labor organization dues, fair share payment, initiation fees and assessments. Except as provided in subsection (e) of this Section, any such deductions shall only be made upon an employee's written authorization, and continued until revoked in writing in the same manner

or until the termination date of an applicable collective bargaining agreement. Such payments shall be paid to the exclusive representative.

Where a collective bargaining agreement is terminated, or continues in effect beyond its scheduled expiration date pending the negotiation of a successor agreement or the resolution of an impasse under Section 14, the employer shall continue to honor and abide by any dues deduction or fair share clause contained therein until a new agreement is reached including dues deduction or a fair share clause. For the benefit of any successor exclusive representative certified under this Act, this provision shall be applicable, provided the successor exclusive representative:

(i) certifies to the employer the amount constituting each non-member's proportionate share under subsection (e); or

(ii) presents the employer with employee written authorizations for the deduction of dues, assessments, and fees under this subsection.

Failure to so honor and abide by dues deduction or fair share clauses for the benefit of any exclusive representative, including a successor, shall be a violation of the duty to bargain and an unfair labor practice.

(g) Agreements containing a fair share agreement must safeguard the right of nonassociation of employees based upon bona fide religious tenets or teachings of a church or religious body of which such employees are members. Such employees may be required to pay an

amount equal to their fair share, determined under a lawful fair share agreement, to a nonreligious charitable organization mutually agreed upon by the employees affected and the exclusive bargaining representative to which such employees would otherwise pay such service fee. If the affected employees and the bargaining representative are unable to reach an agreement on the matter, the Board may establish an approved list of charitable organizations to which such payments may be made.

P.A. 83-1012, § 6, eff. July 1, 1984. Amended by P.A. 85-1032, § 1, eff. July 1, 1988; P.A. 93-854, § 5, eff. Jan. 1, 2005; P.A. 94-472, § 5, eff. Jan. 1, 2006; P.A. 97-1172, § 5, eff. April 5, 2013.

315/9. Elections; recognition

§ 9. Elections; recognition.

(a) Whenever in accordance with such regulations as may be prescribed by the Board a petition has been filed:

(1) by a public employee or group of public employees or any labor organization acting in their behalf demonstrating that 30% of the public employees in an appropriate unit (A) wish to be represented for the purposes of collective bargaining by a labor organization as exclusive representative, or (B) asserting that the labor organization which has been certified or is currently recognized by the public employer as bargaining representative is no longer the representative of the majority of public employees in the unit; or

(2) by a public employer alleging that one or more labor organizations have presented to it a claim that they be recognized as the representative of a majority of the public employees in an appropriate unit, the Board shall investigate such petition, and if it has reasonable cause to believe that a question of representation exists, shall provide for an appropriate hearing upon due notice. Such hearing shall be held at the offices of the Board or such other location as the Board deems appropriate. If it finds upon the record of the hearing that a question of representation exists, it shall direct an election in accordance with subsection (d) of this Section, which election shall be held not later than 120 days after the date the petition was filed regardless of whether that petition was filed before or after the effective date of this amendatory Act of 1987; provided, however, the Board may extend the time for holding an election by an additional 60 days if, upon motion by a person who has filed a petition under this Section or is the subject of a petition filed under this Section and is a party to such hearing, or upon the Board's own motion, the Board finds that good cause has been shown for extending the election date; provided further, that nothing in this Section shall prohibit the Board, in its discretion, from extending the time for holding an election for so long as may be necessary under the circumstances, where the purpose for such extension is to permit resolution by the Board of an unfair labor practice charge filed by one of the parties to a representational proceeding against the other based upon conduct which may either affect the existence of a question concerning representation or have a tendency to interfere with a fair and free election, where the party filing the charge has not filed a request to proceed with the election; and provided further that prior to the expiration of the total time

allotted for holding an election, a person who has filed a petition under this Section or is the subject of a petition filed under this Section and is a party to such hearing or the Board, may move for and obtain the entry of an order in the circuit court of the county in which the majority of the public employees sought to be represented by such person reside, such order extending the date upon which the election shall be held. Such order shall be issued by the circuit court only upon a judicial finding that there has been a sufficient showing that there is good cause to extend the election date beyond such period and shall require the Board to hold the election as soon as is feasible given the totality of the circumstances. Such 120 day period may be extended one or more times by the agreement of all parties to the hearing to a date certain without the necessity of obtaining a court order. Nothing in this Section prohibits the waiving of hearings by stipulation for the purpose of a consent election in conformity with the rules and regulations of the Board or an election in a unit agreed upon by the parties. Other interested employee organizations may intervene in the proceedings in the manner and within the time period specified by rules and regulations of the Board. Interested parties who are necessary to the proceedings may also intervene in the proceedings in the manner and within the time period specified by the rules and regulations of the Board.

(a-5) The Board shall designate an exclusive representative for purposes of collective bargaining when the representative demonstrates a showing of majority interest by employees in the unit. If the parties to a dispute are without agreement on the means to ascertain the choice, if any, of employee

organization as their representative, the Board shall ascertain the employees' choice of employee organization, on the basis of dues deduction authorization or other evidence, or, if necessary, by conducting an election. All evidence submitted by an employee organization to the Board to ascertain an employee's choice of an employee organization is confidential and shall not be submitted to the employer for review. The Board shall ascertain the employee's choice of employee organization within 120 days after the filing of the majority interest petition; however, the Board may extend time by an additional 60 days, upon its own motion or upon the motion of a party to the proceeding. If either party provides to the Board, before the designation of a representative, clear and convincing evidence that the dues deduction authorizations, and other evidence upon which the Board would otherwise rely to ascertain the employees' choice of representative, are fraudulent or were obtained through coercion, the Board shall promptly thereafter conduct an election. The Board shall also investigate and consider a party's allegations that the dues deduction authorizations and other evidence submitted in support of a designation of representative without an election were subsequently changed, altered, withdrawn, or withheld as a result of employer fraud, coercion, or any other unfair labor practice by the employer. If the Board determines that a labor organization would have had a majority interest but for an employer's fraud, coercion, or unfair labor practice, it shall designate the labor organization as an exclusive representative without conducting an election. If a hearing is necessary to resolve any issues of representation under this Section, the Board shall conclude its hearing process and issue a certification of the entire

appropriate unit not later than 120 days after the date the petition was filed. The 120-day period may be extended one or more times by the agreement of all parties to a hearing to a date certain.

(a-6) A labor organization or an employer may file a unit clarification petition seeking to clarify an existing bargaining unit. The Board shall conclude its investigation, including any hearing process deemed necessary, and issue a certification of clarified unit or dismiss the petition not later than 120 days after the date the petition was filed. The 120-day period may be extended one or more times by the agreement of all parties to a hearing to a date certain.

(b) The Board shall decide in each case, in order to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, a unit appropriate for the purpose of collective bargaining, based upon but not limited to such factors as: historical pattern of recognition; community of interest including employee skills and functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours and other working conditions of the employees involved; and the desires of the employees. For purposes of this subsection, fragmentation shall not be the sole or predominant factor used by the Board in determining an appropriate bargaining unit. Except with respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers and peace officers in the State Department of State Police, a single bargaining unit determined by the Board may not include both supervisors and nonsupervisors,

except for bargaining units in existence on the effective date of this Act. With respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers and peace officers in the State Department of State Police, a single bargaining unit determined by the Board may not include both supervisors and nonsupervisors, except for bargaining units in existence on the effective date of this amendatory Act of 1985.

In cases involving an historical pattern of recognition, and in cases where the employer has recognized the union as the sole and exclusive bargaining agent for a specified existing unit, the Board shall find the employees in the unit then represented by the union pursuant to the recognition to be the appropriate unit.

Notwithstanding the above factors, where the majority of public employees of a craft so decide, the Board shall designate such craft as a unit appropriate for the purposes of collective bargaining.

The Board shall not decide that any unit is appropriate if such unit includes both professional and nonprofessional employees, unless a majority of each group votes for inclusion in such unit.

(c) Nothing in this Act shall interfere with or negate the current representation rights or patterns and practices of labor organizations which have historically represented public employees for the purpose of collective bargaining, including but not limited to the negotiations of wages, hours and working conditions, discussions of employees' grievances, resolution of jurisdictional disputes, or the establishment and

maintenance of prevailing wage rates, unless a majority of employees so represented express a contrary desire pursuant to the procedures set forth in this Act.

(d) In instances where the employer does not voluntarily recognize a labor organization as the exclusive bargaining representative for a unit of employees, the Board shall determine the majority representative of the public employees in an appropriate collective bargaining unit by conducting a secret ballot election, except as otherwise provided in subsection (a-5). Within 7 days after the Board issues its bargaining unit determination and direction of election or the execution of a stipulation for the purpose of a consent election, the public employer shall submit to the labor organization the complete names and addresses of those employees who are determined by the Board to be eligible to participate in the election. When the Board has determined that a labor organization has been fairly and freely chosen by a majority of employees in an appropriate unit, it shall certify such organization as the exclusive representative. If the Board determines that a majority of employees in an appropriate unit has fairly and freely chosen not to be represented by a labor organization, it shall so certify. The Board may also revoke the certification of the public employee organizations as exclusive bargaining representatives which have been found by a secret ballot election to be no longer the majority representative.

(e) The Board shall not conduct an election in any bargaining unit or any subdivision thereof within which a valid election has been held in the preceding 12-month period. The Board shall determine who is eligible to vote in an election and shall establish rules governing

the conduct of the election or conduct affecting the results of the election. The Board shall include on a ballot in a representation election a choice of "no representation". A labor organization currently representing the bargaining unit of employees shall be placed on the ballot in any representation election. In any election where none of the choices on the ballot receives a majority, a runoff election shall be conducted between the 2 choices receiving the largest number of valid votes cast in the election. A labor organization which receives a majority of the votes cast in an election shall be certified by the Board as exclusive representative of all public employees in the unit.

(f) A labor organization shall be designated as the exclusive representative by a public employer, provided that the labor organization represents a majority of the public employees in an appropriate unit. Any employee organization which is designated or selected by the majority of public employees, in a unit of the public employer having no other recognized or certified representative, as their representative for purposes of collective bargaining may request recognition by the public employer in writing. The public employer shall post such request for a period of at least 20 days following its receipt thereof on bulletin boards or other places used or reserved for employee notices.

(g) Within the 20-day period any other interested employee organization may petition the Board in the manner specified by rules and regulations of the Board, provided that such interested employee organization has been designated by at least 10% of the employees in an appropriate bargaining unit which includes all or some of the employees in the unit recognized by the

employer. In such event, the Board shall proceed with the petition in the same manner as provided by paragraph (1) of subsection (a) of this Section.

(h) No election shall be directed by the Board in any bargaining unit where there is in force a valid collective bargaining agreement. The Board, however, may process an election petition filed between 90 and 60 days prior to the expiration of the date of an agreement, and may further refine, by rule or decision, the implementation of this provision. Where more than 4 years have elapsed since the effective date of the agreement, the agreement shall continue to bar an election, except that the Board may process an election petition filed between 90 and 60 days prior to the end of the fifth year of such an agreement, and between 90 and 60 days prior to the end of each successive year of such agreement.

(i) An order of the Board dismissing a representation petition, determining and certifying that a labor organization has been fairly and freely chosen by a majority of employees in an appropriate bargaining unit, determining and certifying that a labor organization has not been fairly and freely chosen by a majority of employees in the bargaining unit or certifying a labor organization as the exclusive representative of employees in an appropriate bargaining unit because of a determination by the Board that the labor organization is the historical bargaining representative of employees in the bargaining unit, is a final order. Any person aggrieved by any such order issued on or after the effective date of this amendatory Act of 1987 may apply for and obtain judicial review in accordance with provisions of the

Administrative Review Law, as now or hereafter amended, except that such review shall be afforded directly in the Appellate Court for the district in which the aggrieved party resides or transacts business. Any direct appeal to the Appellate Court shall be filed within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision.

P.A. 83-1012, § 9, eff. July 1, 1984. Amended by P.A. 84-1104, § 1, eff. Jan. 1, 1986; P.A. 84-1443, § 1, eff. Jan. 5, 1987; P.A. 85-924, § 2, eff. July 1, 1988; P.A. 85-1209, Art. III, § 3-44, eff. Aug. 30, 1988; P.A. 85-1393, § 2, eff. Sept. 2, 1988; P.A. 85-1440, Art. II, § 2-54, eff. Feb. 1, 1989; P.A. 87-736, § 1, eff. Jan. 1, 1992; P.A. 88-1, § 1, eff. Jan. 1, 1994; P.A. 93-427, § 5, eff. Aug. 5, 2003; P.A. 93-444, § 5, eff. Aug. 5, 2003; P.A. 95-331, § 30, eff. Aug. 21, 2007; P.A. 96-813, § 5, eff. Oct. 30, 2009.

315/10. Unfair labor practices

§ 10. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act or to dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(2) to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization. Nothing in this Act or any other law precludes a public employer from making an agreement with a labor organization to require as a condition of employment the payment of a fair share under paragraph (e) of Section 6;

(3) to discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition or charge or provided any information or testimony under this Act;

(4) to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit, including, but not limited to, the discussing of grievances with the exclusive representative;

(5) to violate any of the rules and regulations established by the Board with jurisdiction over them relating to the conduct of representation elections or the conduct affecting the representation elections;

(6) to expend or cause the expenditure of public funds to any external agent, individual, firm, agency, partnership or association in any attempt to influence the outcome of representational elections held pursuant to Section 9 of this Act; provided, that nothing in this subsection shall be construed to limit an employer's right to internally communicate with its employees as provided in subsection (c) of this Section, to be represented on any matter pertaining to unit determinations, unfair labor practice charges or

pre-election conferences in any formal or informal proceeding before the Board, or to seek or obtain advice from legal counsel. Nothing in this paragraph shall be construed to prohibit an employer from expending or causing the expenditure of public funds on, or seeking or obtaining services or advice from, any organization, group, or association established by and including public or educational employers, whether covered by this Act, the Illinois Educational Labor Relations Act[1] or the public employment labor relations law of any other state or the federal government, provided that such services or advice are generally available to the membership of the organization, group or association, and are not offered solely in an attempt to influence the outcome of a particular representational election; or

(7) to refuse to reduce a collective bargaining agreement to writing or to refuse to sign such agreement.

(b) It shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce public employees in the exercise of the rights guaranteed in this Act, provided, (i) that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein or the determination of fair share payments and (ii) that a labor organization or its agents shall commit an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act;

(2) to restrain or coerce a public employer in the selection of his representatives for the purposes of collective bargaining or the settlement of grievances; or

(3) to cause, or attempt to cause, an employer to discriminate against an employee in violation of subsection (a)(2);

(4) to refuse to bargain collectively in good faith with a public employer, if it has been designated in accordance with the provisions of this Act as the exclusive representative of public employees in an appropriate unit;

(5) to violate any of the rules and regulations established by the boards with jurisdiction over them relating to the conduct of representation elections or the conduct affecting the representation elections;

(6) to discriminate against any employee because he has signed or filed an affidavit, petition or charge or provided any information or testimony under this Act;

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any public employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization of the representative of its employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any labor organization and a question concerning representation may not appropriately be raised under Section 9 of this Act;

(B) where within the preceding 12 months a valid election under Section 9 of this Act has been conducted; or

(C) where such picketing has been conducted without a petition under Section 9 being filed within a reasonable period of time not to exceed 30 days from the commencement of such picketing; provided that when such a petition has been filed the Board shall forthwith, without regard to the provisions of subsection (a) of Section 9 or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof; provided further, that nothing in this subparagraph shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services; or

(8) to refuse to reduce a collective bargaining agreement to writing or to refuse to sign such agreement.

(c) The expressing of any views, argument, or opinion or the dissemination thereof, whether in written,

printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

P.A. 83-1012, § 10, eff. July 1, 1984. Amended by P.A. 85-924, § 2, eff. July 1, 1988; P.A. 86-412, § 1, eff. Aug. 30, 1989; P.A. 87-736, § 1, eff. Jan. 1, 1992.

Footnotes

1 115 ILCS 5/1, *et seq*.

Appendix B

Illinois Administrative Code

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 676 PROGRAM DESCRIPTION

SUBPART A: GENERAL PROGRAM PROVISIONS

Section 676.10 Program Purpose and Types

a) The Department of Human Services' (DHS) Home Services Program (HSP) is a Medicaid Waiver Program (42 CFR 440.180) designed to prevent the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State.

b) The Medicaid Waiver for the State of Illinois is administered by the Illinois Department of Public Aid (DPA), as the State's approved Medicaid agency. The operational responsibility for HSP, with the exception of hearings on customer appeals (see 89 Ill. Adm. Code 510), rests with DHS.

c) Although DHS shall be responsible for ensuring that the funds available under the HSP are administered in accordance with all applicable laws, DHS shall not have control or input in the employment

relationship between the customer and the personal assistants.

(Source: Amended at 23 Ill. Reg. 6445, effective May 17, 1999)

Section 676.20 General Program Accessibility

a) All communications given or sent to a customer shall be in a language, medium, and at a level which the customer can understand.

b) At any time a non-English print version of any form or document, including the Service Plan, is used to meet the customer's needs and is placed in the case file, an English print copy must also be completed by the counselor or Case Manager and placed with the non-English print version in the case file.

c) All locations in which customer meetings are held must be accessible for the customer and afford the maximum confidentiality for the customer.

(Source: Amended at 23 Ill. Reg. 6445, effective May 17, 1999)

Section 676.30 Definitions

For the purposes of this Subchapter, unless otherwise stated, the following terms shall have the following meanings.

a) Activities of Daily Living (ADLs) - those tasks an individual must do, or which an individual must have provided for him/her, in order to prevent

institutionalization (i.e., bathing, dressing, shopping, cooking, housekeeping, etc.).

b) Customer - anyone who:

1) has been referred to HSP for a determination of eligibility for services;

2) has applied for services through HSP;

3) is receiving services through HSP; or

4) has received services through HSP.

If the customer is unable to satisfy any of his/her obligations under the HSP, including, without limitation, the obligation to serve as the employer of the PA, the customer's parent, family member, guardian, or duly authorized representative may act on behalf of the customer and is included within the definition of "customer", as used throughout this Part.

For purposes of the PA services performed pursuant to the HSP, the customer shall serve as the employer of the PA. In this capacity, the customer is responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing (where, in the opinion of the customer, it is appropriate or necessary) disciplinary action against the PA, and terminating the employment relationship between the customer and the PA.

c) Counselor - the DHS-ORS staff person or contractual Case Manager who helps to ensure that the funds available under the HSP are properly distributed in accordance with the Service Plan, any applicable waiver programs, and all applicable laws.

d) Determination of Need (DON) - the assessment tool used to determine an individual's non-financial eligibility for HSP services based on the individual's impairment and need for care. This form measures the level of risk of institutionalization for the individual.

e) DHS - Illinois Department of Human Services.

f) DPA - Illinois Department of Public Aid.

g) Family - any one related by blood, marriage, or adoption to the individual seeking services through HSP or anyone with whom the individual has a close interpersonal relationship and who resides with the individual.

h) Family Unit - for the purposes of determining financial eligibility, the number of persons derived when counting the individual seeking services through HSP and the number of persons in the household who are legally responsible for the individual seeking services and for whom the individual seeking services is legally responsible.

i) HCFA - the federal Health Care Financing Administration.

j) Home Services Program (HSP) - a State and federally funded program designed to allow Illinois

residents, who are at risk of unnecessary or premature institutionalization, to receive necessary care and services in their homes, as opposed to being placed in an institution.

k) Home - a private residence where the customer lives which is not an intermediate care or skilled nursing facility as defined at 77 Ill. Adm. Code 300, or a residential program operated by, or for which funding is provided by, the Illinois Department of Human Services, Office of Mental Health and Office of Developmental Disabilities as defined at 59 Ill. Adm. Code 120. For the purposes of this Subchapter, the term "home" shall include domestic violence shelters as defined in Section 1(c) of the Domestic Violence Shelter Act [20 ILCS 2210/1(c)] and publicly or privately administered shelters designed to provide temporary living accommodations for persons who are homeless.

l) Intermediate Care Facility (ICF) - a nursing facility that provides regular health related care to its residents, as well as those services necessary for safe and adequate living.

m) Legally Responsible Family Member - a spouse, parent of a child who is under age 18 or a legal guardian of an individual who is under age 18.

n) Medicaid - the Medicaid program administered by DPA under the Public Aid Code [305 ILCS 5/11].

o) Medicaid Waiver - the waiver allowing HSP to claim federal reimbursement for approved levels of in-home care for individuals who would otherwise be

placed in institutions for such care. The Medicaid Waiver is overseen at the federal level by HCFA.

p) Personal Assistant (PA) - an individual employed by the customer to provide through HSP varied services that have been approved by the customer's physician.

q) Personal Assistant Backup Plan - the plan developed by the customer and designed to ensure that the customer receives the necessary care and services under the HSP in the event that his/her regular PA is unavailable or unwilling to perform his/her obligations under the HSP. The customer is responsible for designating the backup personal assistant.

r) Physician - a licensed doctor of medicine (M.D.) or doctor of Osteopathy (D.O.) licensed pursuant to the Medical Practice Act [225 ILCS 60].

s) Prescreening - an assessment to determine an individual's need for institutional care at the ICF or SNF level care, to ensure Medicaid payment for such a placement is appropriate, and the assessment as to whether or not HSP services are an appropriate alternative to institutional care for the individual.

t) Service Cost Maximum (SCM) - the maximum monthly amount which may be expended for HSP services for an eligible individual. This amount is determined based on the individual's DON score and the specific programmatic component of HSP through which the individual is being served.

u) Service Plan - specifically, the Home Services Program Service Plan (IL 488-1049), Home Services

Program Service Plan Addendum (IL 488-1050) or the Interim Agreement (IL 488-2344) forms, on which all services to be provided to an individual through HSP are listed.

v) Services - the necessary tasks provided to an individual, in one or more of the areas listed in Section 676.40 and listed on the individual's Service Plan, through HSP with the intent of preventing the unnecessary institutionalization of the individual.

w) Skilled Nursing Facility (SNF) - a facility that provides regular and on-going nursing level care to its residents due to the residents' medical conditions, as well as those services necessary for safe and adequate living.

(Source: Amended at 24 Ill. Reg. 2681, effective February 2, 2000)

Section 676.40 Service Description

The following is a listing of the services available through HSP. The service level, combination of services, and amount of services for which a customer is eligible is dependent upon the needs of the customer as determined during the determination of eligibility (see 89 Ill. Adm. Code 682).

a) Personal Assistant (PA) Services – services provided by an individual employed by the customer. HSP Services provided by a PA must be approved by the customer's physician.

b) Adult Day Care (ADC) Services – direct care and monitoring of customers in a community-based setting for any portion of a 24-hour day for the purpose of promoting social, physical, and emotional health and well being and offering an alternative to an institutional setting. ADC services are provided only when the social, emotional, and physical needs of the customer cannot be met in the home through other available services.

c) Homemaker Services – general support provided by trained and professionally supervised individuals to maintain, strengthen, and safeguard the functioning of an individual in his/her home when no responsible person is available or capable of monitoring such services. Such services include the actual completion of, and the training in, completion of ADLs.

d) Maintenance Home Health Services – services provided for a customer, in his/her home, in accordance with a care plan prescribed or recommended by a physician or other health care professional. These services include three basic categories of care, which are:

1) direct health care provided by a registered nurse (RN) and/or a licensed practical nurse (LPN);

2) direct health care provided by a Certified Nurse Aid (CNA) who is supervised by a RN or LPN; and

3) in-home therapy, including the areas of physical, occupational and speech therapy.

e) Home Delivered Meals – prepared food brought to the customer's home. Usually, home delivered meals

consist of a hot lunch and a smaller dinner meal that may be refrigerated and eaten later. These services are provided when available and when they are more cost effective than PA services for an eligible individual who has a need for care in the area of meal preparation but who can adequately feed him/herself.

f) Electronic Home Response Services (EHRS) – a 24-hour per day emergency communication link to assistance outside the customer's home for customers who have no other persons available for assistance should an emergency arise.

g) Assistive Equipment – items necessary to accommodate the customer's loss of function in the completion of his/her Activities of Daily Living (ADLs). This does not include medical supplies, disposable personal hygiene items, or items necessary for medical treatment. (See 89 Ill. Adm. Code 686, Subpart H.)

h) Environmental Modification – services to physically modify the customer's home to accommodate the customer's loss of function in the completion of his/her ADLs. (See 89 Ill. Adm. Code 686, Subpart G.)

i) Respite Services – limited PA, Homemaker, and Maintenance Home Health services provided to a customer to provide for his/her ADLs during periods of time it is necessary for the family/primary care giver to be absent. Respite services are provided to a customer to allow the family/primary care giver relief for vacations, rest, errands, family crises and emergency situations. Respite services are provided in the maximum amount of 240 hours per calendar year and are provided regardless of financial need.

j) Day Habilitation Services – assistance provided to a person with a brain injury to assist with the acquisition, retention and improvement in self-help, socialization and adaptive skills. These services are provided in a setting separate from the residence in which the customer is residing.

k) Pre-Vocational Services – services provided to a person with a brain injury that are aimed at preparing the individual for paid or unpaid employment, but are not job task oriented. Specific services include teaching concepts such as compliance, attendance, task completion, problem solving and safety.

l) Supported Employment Services – services provided to a customer with a brain injury, which consist of paid employment for persons for whom competitive employment is unlikely, who because of his or her disabilities need intensive, ongoing support to perform in a work setting. Supported Employment includes, but is not limited to, activities needed to sustain the customer in supported employment (i.e., supervision and training).

m) Behavioral Services – remedial therapies provided to a person with a brain injury to decrease the individual's severe maladaptive behaviors. These services are intended to enable the customer to better manage his or her behavior and therefore be more capable of living independently.

(Source: Amended at 31 Ill. Reg. 12602, effective August 16, 2007)

SUBPART B: CASE MANAGEMENT

Section 676.100 Case Files (Repealed)

(Source: Repealed at 23 Ill. Reg. 6445, effective May 17, 1999)

Section 676.110 Sharing of Customer Information Between HSP and Other DHS Programs

a) All information received by DHS-ORS for the purpose of providing HSP services to a customer shall only be used for such purposes and may not be shared with any other program of DHS unless the individual consents to the release of such information and a release of information is signed by the customer authorizing the release.

b) No information may be obtained from a case file of another program of DHS by HSP for the purposes of providing services to a customer unless the customer consents to the release of such information and a release of information is signed by the customer authorizing the release. DHS-ORS shall only release information pursuant to the Health Insurance Portability and Accountability Act (42 USC 1320(d) et seq.) and the regulations promulgated thereunder.

(Source: Amended at 28 Ill. Reg. 6445, effective April 8, 2004)

Section 676.120 Documentation of Information

All records and information which may effect the determination of eligibility, services, or future services must be maintained in the customer's case file.

(Source: Amended at 23 Ill. Reg. 6445, effective May 17, 1999)

Section 676.130 Customer Signatures and Information Required to Receive Services Under the HSP

a) In order to receive services, or continue to receive HSP services, for which DHS-ORS would pay on behalf of the customer, a customer is required to sign all forms, and supply any information required to complete those forms, which are necessary to comply with all applicable State and federal laws or the provisions of the Medicaid Waiver or are necessary to process payments through the Comptroller's Office.

b) Consistent with its obligation to ensure that the HSP funds are properly distributed, the Department shall have the authority to develop sample forms that may be used as guidance to the customer in the exercise of his/her obligations under the HSP. Except as required by law or specific provisions of the HSP, the customer is not obligated to use such sample forms and may deviate from or alter such sample forms.

c) A customer employing a personal assistant is required to enter into an Employment Agreement with his/her personal assistant to confirm their

understanding of the nature of the employment relationship involved and the extent of control that the customer retains over the services performed by the personal assistant, as prescribed by 89 Ill. Adm. Code 686.10.

(Source: Amended at 23 Ill. Reg. 6445, effective May 17, 1999)

Section 676.140 Application by DHS-ORS Employees, Individuals Holding Contracts with DHS-ORS, DHS-ORS Advisory Council Members, Family Members of DHS-ORS Employees, or Close Friends of DHS-ORS Employees

a) At any time a DHS-ORS employee, an individual holding a contract with DHS-ORS, a DHS-ORS Advisory Council member, a family member of a DHS-ORS employee, or a close friend of a DHS-ORS employee applies for services from DHS-ORS, and it is brought to the attention of the counselor, the counselor must notify his/her supervisor who shall notify the Home Services Administration in writing.

b) After review of the situation, the Home Services Administration shall make assignment of the case to an appropriate staff member to ensure propriety of services.

c) For the purposes of this Section, "family member" shall mean spouse, sibling, child, parent, parent-in-law, sibling-in-law, or any other blood relative who resides in the household of the employee or employee's spouse.

d) For the purpose of this Section, "close friend" shall mean any individual who has such a relationship with the employee that would cause a conflict of interest or the appearance of impropriety.

e) Any employee who knows of or suspects that services to another DHS-ORS employee, individual who holds a contract with DHS-ORS, DHS-ORS Advisory Council member, family member of a DHS-ORS employee, or close friend of a DHS-ORS employee have not been reported as required in subsection (a), above, shall report the situation to his/her immediate supervisor. The immediate supervisor must investigate the situation and take appropriate action. Appropriate action may include reassignment of the case and discipline of the employee violating these requirements if there is evidence the employee knew the individual to be an individual described in subsection (a), above, and failed to report the situation.

(Source: Amended at 23 Ill. Reg. 6445, effective May 17, 1999)

Section 676.150 Geographic Case Assignment

A customer will be served by the office which is assigned the geographic area of the customer's residence. Exceptions to such assignment may be made only with the written approval of the Home Services Program, Chief of the Bureau of Field Operations.

(Source: Amended at 23 Ill. Reg. 6445, effective May 17, 1999)

SUBPART C: VENDOR PAYMENT

Section 676.200 Vendor Payment

Because HCFA regulations (42 CFR 447.10(d)) prohibit re-assignment of provider claims, no payment will be made directly to any customer of the HSP. In order to ensure that HSP funds are administered properly, no payment, on behalf of any customer, will be made to any vendor unless the services for which the payment is to be made were approved by DHS-HSP. No payment, on behalf of any customer, shall be made until after service has been rendered and verified.

(Source: Amended at 23 Ill. Reg. 6445, effective May 17, 1999)

Section 676.210 Reporting and Collection of Misspent Funds

Any funds authorized through HSP thought to have been misspent shall be reported and collected, as appropriate pursuant to DHS rules found at 89 Ill. Adm. Code 527 - Misspent Funds.

SUBPART D: REFERRAL TO DEPARTMENT ON AGING DoA

Section 676.300 Criteria for Referral to DoA

In accordance with the provisions of the interagency agreement between DHS and DoA, individuals meeting the following criteria shall be referred to DoA to receive services through DoA's Community Care Program

(CCP) and their HSP cases closed after the initiation of CCP services. These individuals are those who:

a) are at least 60 years of age at the time of the referral to DoA;

b) are receiving only homemaker services, adult day care services, home delivered meals, or any combination of these services;

c) have a DON score of at least 15 points on Part A, which includes the 10 points from the Mini-Mental Status Examination (89 Ill. Adm. Code 679.20(a)), if applicable, with a total score of not less than 29 points; and

d) have agreed to being referred to DoA to receive services.

(Source: Amended at 21 Ill. Reg. 2678, effective February 7, 1997)

Section 676.310 Disposition of Cases not Appropriate for Referral to DoA

Any customer not meeting the criteria for referral to DoA stated in Section 676.300 shall have his/her case maintained by DHS and shall continue to receive services through HSP as long as he/she continues to meet the eligibility criteria established by DHS.

(Source: Amended at 23 Ill. Reg. 6445, effective May 17, 1999)

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 677 CUSTOMER RIGHTS AND RESPONSIBILITIES

SUBPART A: CUSTOMER RIGHTS

Section 677.10 Assurance of Customer Rights

The customer shall be informed of his/her rights at the time of referral, application, eligibility determination, service initiation, change in services, case closure and upon request.

Section 677.20 Nondiscrimination

DHS shall not discriminate against any customer seeking or receiving services through HSP on the basis of his/her race, religion, sex, marital status, national origin or ancestry, age, handicap, disability, military status or any other status protected by law.

(Source: Amended at 23 Ill. Reg. 5072, effective April 12, 1999)

Section 677.30 Confidentiality of Information

All customer information maintained by DHS-ORS for the purposes of administering the funds available under the HSP is confidential and shall only be used for the purpose of the administration of HSP, pursuant to the Health Insurance Portability and Accountability Act (42

USC 1320(d) et seq.) and the regulations promulgated thereunder, and DHS' rules found at 89 Ill. Adm. Code 505 - Confidentiality and 89 Ill. Adm. Code 676.110.

(Source: Amended at 28 Ill. Reg. 6449, effective April 8, 2004)

Section 677.40 Freedom of Choice

Under the HSP, a customer has the following rights; however, the choices made by the customer may affect the services available through HSP for which the customer is eligible or which might otherwise be available.

a) A customer shall have the right to apply for and, if eligible, receive services under the program of the customer's choice. Therefore, a customer eligible for both institutional care and HSP services has the right to choose one or the other, but may not receive both at the same time. Institutional care is not available through HSP and, if the customer chooses HSP services, DHS-ORS shall have the right to determine the waiver under which the customer will be served and the level of the provider of services.

b) At any time, a customer has the right not to accept those HSP services that he/she has been determined eligible to receive. However, if the customer chooses to terminate services, he/she may have to reapply for services and undergo another determination of eligibility if he/she later desires services through HSP.

c) A customer has the right to choose his/her living arrangement, including the physical dwelling and

persons residing in the dwelling. However, such choices may impact the amount or scope of the services received by the customer. HSP will not impose a living arrangement on any customer.

d) A customer applying for, or receiving, services through HSP shall have the right to choose medical and non-medical service providers. However, payment may only be made to those service providers which meet the standards established by DHS as found at 89 Ill. Adm. Code 686 and who will accept DHS' fees for a specific service approved by DHS, if DHS is to issue payment for the service.

(Source: Amended at 23 Ill. Reg. 5072, effective April 12, 1999)

Section 677.50 Referral

a) A customer has the right to receive information regarding all DHS programs, including HSP.

b) A customer has the right to be referred by HSP for other appropriate services, within and outside DHS. The customer's permission must be received in writing prior to HSP making any such referral, pursuant to DHS rules at 89 Ill. Adm. Code 505 - Confidentiality.

Section 677.60 Application

An individual has the right to apply for services through any DHS programs and to have the application processed in an appropriate and expedient manner.

Section 677.70 Notice of Action

Every customer has the right to a written notice of the disposition of any referral, application, or any denial, termination, or change in services. Such a notice shall be mailed at least 15 working days prior to the effective date of the action and shall include:

a) a clear statement of the action taken;

b) a clear statement of the reason for the action;

c) a clear and complete statement of the customer's right of appeal;

d) a statement indicating that, if an appeal is filed, services will continue at the level at the time the appeal is filed during the period of the appeal under the conditions and limitations stated at 89 Ill. Adm. Code 510.60.

Section 677.80 Appeal of an Action Taken by HSP

The customer has the right to appeal an action or inaction on the part of HSP, with certain limitations, as set forth at 89 Ill. Adm. Code 510 - Appeals and Hearings.

(Source: Amended at 23 Ill. Reg. 5072, effective April 12, 1999)

Section 677.90 Repayment of Assistance

a) If the customer's financial status changes, DHS shall not seek repayment for the HSP services provided prior to the date DHS-ORS was knowledgeable of the change. At any time, a customer may voluntarily repay all or part of the costs associated with services provided to him/her.

b) DHS shall seek repayment for any and all services determined to have been inappropriately provided to a customer due to false disclosure, omission or misrepresentation of a customer's financial status. Reimbursement shall be sought pursuant to DHS' rules found at 89 Ill. Adm. Code 527 - Recovery of Misspent Funds.

(Source: Amended at 23 Ill. Reg. 5072, effective April 12, 1999)

SUBPART B: CUSTOMER RESPONSIBILITIES

Section 677.200 Consumer Responsibilities

It is the responsibility of each customer of HSP to:

a) provide that information necessary for DHS to process the referral of that individual for HSP services;

b) provide a mailing and street address, along with directions to the individual's home sufficient for the DHS counselor to locate the individual;

c) provide a telephone number if the individual has a telephone;

d) sign an application, if the customer wishes a determination of eligibility to be made for HSP service;

e) assist DHS' staff on gathering the information necessary to determine eligibility;

f) sign all required forms which are necessary to comply with applicable federal law or the provisions of the Medicaid Waiver or are necessary to process payment through the Comptroller's Office;

g) a customer receiving services from a personal assistant (PA) must sign the Employment Agreement between customer and PA to acknowledge his/her understanding of the nature of their employment relationship. The customer as the employer of his/her PA is responsible for controlling all aspects of the employment relationship with the PA, including without limitation, locating and hiring the PA and, if necessary, disciplining and terminating the employment of the PA;

h) report all changes in circumstances which may effect eligibility or continued eligibility for services to DHS, as soon as known. Such changes include changes in:

1) address;

2) living arrangement;

3) income or assets;

4) services provided to the individual at no cost to DHS;

5) service needs;

6) medical and/or psychological condition;

7) services providers;

8) absence of the individual from his/her home that affects service provision; and

9) residency or citizenship status;

i) apply for any and all other financial and service benefits that the customer may be expected to be eligible insofar that eligibility for these services may affect HSP eligibility, level of services required by the individual and cost of services to DHS;

j) cooperate with HSP projects conducted for the purpose of obtaining or validating general program information or operations where such projects are not related to customer-specific eligibility;

k) cooperate with service providers, DHS staff, and representatives in complying with HSP service plans, reassessments of eligibility and other administrative rules established in this Subchapter; and

l) cooperate with DPA in applying for receiving, maintaining and recertifying eligibility for Medicaid.

(Source: Amended at 23 Ill. Reg. 5072, effective April 12, 1999)

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 678 CLIENT RIGHTS (REPEALED)

SOURCE: Repealed at 19 Ill. Reg. 5054, effective March 21, 1995.

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 679 DETERMINATION OF NEED (DON) AND RESULTING SERVICE COST MAXIMUMS (SCMs)

Section 679.10 General Provisions

a) The DON, pursuant to 89 Ill. Adm. Code 676.30(d), is the assessment tool used to determine an individual's non-financial eligibility for HSP services based on the individual's impairment in the completion of the activities of daily living (ADLs) (Part A) and the individual's need for care that is not met by existing family and other resources (Part B). This assessment is made to determine whether or not the individual is at imminent risk of institutionalization, and therefore eligible for placement in a hospital/nursing facility and/or services through HSP.

b) If the individual receives at least the minimum DON score to be considered eligible for institutional placement or HSP services (see 89 Ill. Adm. Code 682), the DON score relates to a specific Service Cost Maximum (SCM) that may be expended on services for

an individual who chooses HSP services as an option to institutionalization (see Section 679.50).

Section 679.20 Composition of the DON

The DON is comprised of three sections which are:

a) the Mini-Mental Status Examination section, as developed by the University of Illinois-Chicago, School of Public Health, which is used to determine the individual's cognitive functioning, and therefore the ability of the individual to adequately respond to the DON questions about his or her functioning capacity in the completion of the DON. Home Service Program staff may choose to not administer the MMSE if interaction with the customer, during the interview to gather demographic information, reveals no cognitive problems. The Mini-Mental Status Examination section shall not be administered to individuals who:

1) are 12 years of age or younger;

2) manifest, or have been diagnosed with, mental retardation or a related condition that results in impairment of a person's general intellectual functioning; or

3) manifest adaptive behavior and require services similar to an individual with mental retardation.

b) Part A which measures the individual's need for care in the completion of ADLs; and

c) Part B which measures the individual's unmet need for care in the completion of ADLs.

(Source: Amended at 24 Ill. Reg. 6563, effective May 1, 2000)

Section 679.30 Scoring of the DON Except for Respite Cases

a) An individual receiving a 14 or more on the Mini-Mental Status Examination shall receive "zero" points towards his/her column A score. An individual receiving less than 14 points shall receive an additional "10" points added to his/her column A score for the determination of eligibility and a SCM.

b) The remaining two sections of the DON measure the individual's ability to complete the ADLs. The ADLs are specifically: eating, bathing, grooming, dressing, transferring, incontinence care, preparing meals, being alone, telephoning, managing money, routine health care tasks (or those health care tasks not requiring specialized training), specialized health care tasks (or those requiring assistance from trained medical practitioners), necessary travel outside the home, laundry, and housework.

1) Part A of the DON measures the individual's need for assistance in the completion of each of the ADLs on the following rating scale.

A) "0" – the individual can perform all essential components of the ADL with or without an existing assistive device;

B) "1" – the individual can perform most of the ADL, with or without an existing assistive device, but

requires some supervision and/or assistance to ensure the task is fully completed;

C) "2" – the individual requires a great deal of supervision and/or assistance, with or without existing assistive devices, in the completion of the essential components of the task; and

D) "3" – the individual cannot perform any of the essential components of the task, with or without existing assistive devices and requires constant supervision and/or assistance.

2) Part B of the DON measures the individual's unmet need for care in the completion of the ADLs on the following scale.

A) "0" – the individual has no unmet need for care in that the individual needs no assistance in completion of the essential components of the task, or family and/or other resources already provide for this task;

B) "1" – the individual's need for assistance in the completion of the task is met at least 50% of the time, and, without periodic assistance, there is a risk to the individual's health and safety;

C) "2" – the individual's need for assistance in the completion of the task is met less than 50% of the time and, without assistance, there is moderate risk to the individual's health and safety; and

D) "3" – the individual's need for assistance in the completion of the task is seldom (less than 10% of

the time) or never met and, without assistance, there is extreme risk to the individual's health and safety.

c) In administering the DON for children, the assessor should ensure the ratings given reflect limitations due to the individual's disability and not the individual's age and/or the additional burden placed on the caregiver.

1) On Part A, determine if a child of the individual's age should be able to complete all or part of the task. If the inability to perform the task relates only to the individual's age, a score of "zero" should be given. Otherwise, score "1" "2", or "3" according to the individual's impairment level.

2) On Part B, determine the additional burden placed on a caregiver providing the service. If, because of the individual's age, there is no increased burden, a score of "0" should be given. If there is an increased burden on the caregiver due to the individual's disability, score "1", "2", or "3" according to the increased level of burden in providing the task.

(Source: Amended at 31 Ill. Reg. 11332, effective July 18, 2007)

Section 679.40 Scoring the DON for Respite Cases

In order to be eligible for respite services, the individual must receive 29 points in Part A of the DON, which includes the 10 points from the Mini-Mental Status Examination, as appropriate. No points are necessary

in Part B as respite services are to provide relief to a caregiver who normally provides all care for an individual which is at no cost to DHS.

Section 679.50 Service Cost Maximums (SCMs)

a) For each individual meeting the minimum required DON scores for eligibility (see 89 Ill. Adm. Code 682), there is a corresponding Service Cost Maximum (SCM) for his/her DON score which is the maximum amount that may be expended for services through HSP for an individual who chooses HSP services over institutionalization. This amount directly corresponds to the amount the State would expect to pay for the nursing care component of institutionalization if the individual chose institutionalization.

b) The monthly SCMs for individuals served under the HSP Disabled Individual Medicaid Waiver are:

DON Range	11/1/03 SCM	8/1/04 SCM	8/1/05 SCM	8/1/06 SCM	8/1/07 SCM
29-32	$1,154	$1,194	$1,249	$1,329	$1,488
33-40	$1,326	$1,371	$1,435	$1,527	$1,710
41-49	$1,475	$1,526	$1,597	$1,699	$1,902
50-59	$1,766	$1,827	$1,912	$2,034	$2,277
60-69	$2,076	$2,147	$2,247	$2,390	$2,677
70-79	$2,244	$2,322	$2,430	$2,585	$2,894
80-100	$2,412	$2,495	$2,612	$2,778	$3,111

c) The monthly SCMs for individuals served under the HSP AIDS Medicaid Waiver are:

DON Range	11/1/03 SCM	8/1/04 SCM	8/1/05 SCM	8/1/06 SCM	8/1/07 SCM
29-32	$1,486	$1,538	$1,609	$1,712	$1,917
33-40	$2,228	$2,305	$2,412	$2,566	$2,873
41-49	$2,970	$3,073	$3,216	$3,421	$3,831
50-59	$3,714	$3,842	$4,021	$4,278	$4,790
60-69	$4,458	$4,611	$4,827	$5,134	$5,749
70-79	$5,198	$5,378	$5,628	$5,987	$6,704
80-100	$5,943	$6,148	$6,435	$6,845	$7,664

d) The monthly SCMs for individuals served under the HSP Brain Injury Medicaid Waiver are:

DON Range	11/1/03 SCM	8/1/04 SCM	8/1/05 SCM	8/1/06 SCM	8/1/07 SCM
29-32	$1,286	$1,331	$1,393	$1,482	$1,659
33-40	$1,427	$1,476	$1,545	$1,644	$1,841
41-49	$1,586	$1,640	$1,717	$1,826	$2,045
50-59	$1,901	$1,966	$2,058	$2,189	$2,451
60-69	$2,234	$2,311	$2,419	$2,573	$2,881
70-79	$2,415	$2,499	$2,615	$2,782	$3,115
80-100	$2,597	$2,686	$2,811	$2,990	$3,349

e) The SCM for an individual may be exceeded on a monthly basis to meet a temporary increase in need for services as long as the average monthly cost for services during the twelve month period does not exceed the SCM. Such an increase in services shall not last more than 3 months.

f) The exceptional care rate (ECR) for individuals who cannot be served under an HSP waiver's SCM is

established by the Department of Healthcare and Family Services (HFS) under 89 Ill. Adm. Code 140.569(i). This rate is comparable to the assessed cost for institutionalization and shall not be exceeded. To determine the exceptional care rate for an individual served under an HSP waiver program:

1) the nearest approved exceptional care nursing facility to the individual's home is identified;

2) the exceptional care rate for that facility is requested from HFS; and

3) the daily exceptional care rate is multiplied by 30.3 to establish a monthly average.

(Source: Amended at 31 Ill. Reg. 422, effective December 29, 2006)

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 680 CLIENT RESPONSIBILITIES
(REPEALED)

SOURCE: Repealed at 19 Ill. Reg. 5052, effective March 21, 1995.

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 681 PRESCREENING

Section 681.10 Who Must be Prescreened

Per Department of Public Aid (DPA) rules found at 89 Ill. Adm. Code 140.642, certain individuals ages 18 through 59 who are not determined to be developmentally disabled or classified with severe mental illness as determined through completion of the Level I ID Screen (OBRA:1), who seek nursing facility placement, must be prescreened. For the purpose of this Part, "nursing facility" means a location licensed under the Nursing Home Care Act [210 ILCS 45] as a skilled or intermediate nursing facility, or a location certified to participate in the Medicare program under Title XVIII of the Social Security Act (42 U.S.C. 301, et seq.), or the Medicaid program under Title XIX of the Social Security Act.

(Source: Amended at 20 Ill. Reg. 10366, effective July 19, 1996)

Section 681.20 DHS Prescreening Responsibilities

a) Pursuant to Section 2-201.5 of the Nursing Home Care Act [210 ILCS 45], DHS must prescreen any individual, as described in Section 681.10, who seeks admission to a nursing facility.

b) DHS Home Services Program does not prescreen individuals who:

1) are less than 18 years of age, or 60 years of age or older;

2) are transferred from one nursing facility to another nursing facility;

3) resided in a nursing facility for a period of at least 60 calendar days who are returning to a nursing facility after an absence of not more than 60 calendar days;

4) are returning to a nursing facility after an absence for medical care, regardless of the duration of the absence;

5) have a diagnosis of developmental disability or severe mental illness, regardless of age;

6) are admitted to a facility that is part of a Life Care Contract;

7) are admitted to a hospice;

8) are admitted to a nursing facility for respite care from the community for a period of no more than 15 calendar days;

9) are admitted to a sheltered care facility;

10) are admitted to a facility operated under the Hospital Licensing Act [210 ILCS 85] whose actual length of stay in such a facility is less than 21 calendar days. If an individual's stay extends to 21 days or beyond, he/she must be prescreened;

11) are admitted to a facility operated by a provider licensed under the Alternative Care Delivery Act [210 ILCS 3/35] whose actual length of stay in such

a facility is less than 21 calendar days. If an individual's stay extends to 21 days or beyond, he/she must be prescreened; or

12) were residents of a nursing facility on June 30, 1996.

(Source: Amended at 23 Ill. Reg. 3989, effective March 19, 1999)

Section 681.30 Prescreening Process

The Prescreening process is the completion of the DON and reporting of the results. The DON, completed by the counselor or appropriate representative of a cooperating social service agency/hospital who has been trained by DHS or DoA, measures the level of impairment of an individual and the individual's unmet need for care. Determination of eligibility for institutional care and eligibility for HSP services is based on the points earned in both of these categories and their totals. The results of the Prescreening are reported via the Inter-Agency Certification of Screening Results For Long Term Care (DPA:2536).

(Source: Amended at 23 Ill. Reg. 3989, effective March 19, 1999)

Section 681.35 Assessment Validity Period and Customer Rights

A prescreening shall be valid for a period of 90 calendar days from the date of completion. The individual who is prescreened shall be informed of:

a) the availability of services through the Home Services Program, if such services are appropriate; and

b) his/her right to refuse nursing facility placement, Home Services, or both.

(Source: Added at 20 Ill. Reg. 10366, effective July 19, 1996)

Section 681.40 Time Frames

a) If a request for a prescreening is received by DHS from a social service agency/hospital which is providing DHS with customer information including a DON score, the counselor must act on the request within 2 working days.

b) If a request for prescreening is received by DHS from a social services agency/hospital or the community which includes only basic customer information (i.e., name, address, etc.), the counselor must act on the request within 5 working days.

(Source: Amended at 20 Ill. Reg. 10366, effective July 19, 1996)

Section 681.50 Outcome of Prescreening Process

As a result of the Prescreening, the individual will be determined as:

a) eligible for nursing facility placement and therefore eligible to consider HSP as an alternative to institutional care; or

b) ineligible for nursing facility placement or to receive HSP services.

(Source: Amended at 20 Ill. Reg. 10366, effective July 19, 1996)

Section 681.60 Certification of Prescreening Results

a) After the prescreening is completed, if the customer has chosen institutional placement, the counselor must complete an Inter-Agency Certification of Screening Results For Long Term Care (DPA:2536) form and an OBRA 1 ID Screen form and forward the results to the nursing facility. A partial HSP Eligibility Summary (IL 488-0325) is required from the case file.

b) Further, if the individual is eligible and has chosen institutional placement over HSP services, the customer must sign and date the appropriate form, indicating nursing home preference and that the customer has been informed of the availability of HSP services as an alternative to institutionalization and has chosen the institutional care.

c) Results must be certified, as per subsection (a) above, regardless of whether the individual is eligible.

(Source: Amended at 23 Ill. Reg. 3989, effective March 19, 1999)

Section 681.70 Necessity of Prescreening

It is not required that an individual undergo prescreening to apply for HSP services. Prescreening is only required when institutionalization is being considered as a placement for the individual.

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 682 ELIGIBILITY

SUBPART A: GENERAL APPLICABILITY

Section 682.10 General Applicability

In order to receive services through HSP, an individual must meet all non-financial eligibility criteria and financial eligibility criteria as listed in this Part.

SUBPART B: NON-FINANCIAL ELGIBILITY CRITERIA

Section 682.100 General Eligibility Criteria

In order to receive services through HSP a customer must:

a) be a citizen of the United States, or be an individual who is living permanently in the United States after having been legally admitted;

b) have applied for, be a recipient of, or be found eligible for Medicaid benefits through HFS and within 60 days after the date of application for HSP provide verification to the HSP counselor of the aforementioned. Customers may be found eligible for Medicaid and be placed on Spend Down. However, a customer is not required to meet the eligibility criteria for Medicaid to receive benefits, nor is Medicaid eligibility or verification of application required to receive Interim Services (see 89 Ill. Adm. Code 682). The customer must agree to apply for Medicaid, and cooperate with HFS, to receive Interim Services. Customers having applied for HSP services prior to October 1, 1991, may choose to apply for Medicaid;

c) be a resident of the State of Illinois;

d) be under the age of 60 at the time of application for HSP services, unless the individual is applying for services under the HSP AIDS Medicaid Waiver or under the HSP Brain Injury Medicaid Waiver, in which case there is no age criteria for application;

e) have a severe disability which is expected to last for at least 12 months or for the duration of life;

f) be an individual with a disability who is in need of long-term care, as determined by the DON score completed as a result of a prescreening (89 Ill. Adm. Code 679) or application for HSP services. In order to be determined to have met this criteria, the individual must receive a DON score of at least 15 points on part A, which includes, if applicable, the 10 points from the Mini-Mental Examination, with a total DON score of at least 29 points;

g) with DHS assistance, obtain certification at least every two years from a physician or from a neuropsychologist for a person with a brain injury (as defined in Section 676.30(r)) that indicates the individual is in need of long-term care and this care can safely and adequately be provided in the individual's home according to the physician and the HSP Service Plan; and

h) not require in-home services that are expected to cost more than the cost the State would pay for institutional care for an individual with a similar DON score.

(Source: Amended at 31 Ill. Reg. 428, effective December 29, 2006)

SUBPART C: FINANCIAL ELIGIBILITY CRITERIA

Section 682.200 Assets Limitation

a) Adult customers, age 18 years or above, may have no more than $10,000 in customer-only non-exempt assets in order to receive services through HSP.

b) Minor customers, those under 18 years, may have no more than $30,000 in total family non-exempt assets. In order to determine total family assets, the customer and all other individuals who contribute to the family unit, or rely on the family unit for support, shall be counted.

c) A married customer, whose spouse does not receive HSP services and is not institutionalized, shall not own interest in non-exempt assets having a total value in excess of $10,000. Non-exempt assets having a value over this figure and up to the amount allowed by the Community Spouse Asset Allowance, as adopted by the Illinois Department of Public Aid at 89 Ill. Adm. Code 120.379(d), must be transferred to, or for the sole benefit of, the community spouse. If the customer's assets exceed the asset disregard and prevention of spousal impoverishment amount, but the excess is less than $10,000, the customer is eligible for HSP services. If the excess is greater than $10,000, the individual is ineligible for services. Customers who may be qualified for the spousal impoverishment exception may receive Interim Services while the Department of Public Aid determines the eligibility factor.

(Source: Amended at 23 Ill. Reg. 14450, effective December 6, 1999)

Section 682.210 Transfer of Assets

a) Any transfer or sale of non-exempt assets which occur within the time periods specified in this Section shall be used in determining the individual's assets for the purpose of Section 682.200.

b) Transfers involving a trust shall be considered as an asset unless the transfer occurred 60 months prior to the individual's application for services.

c) If an individual applying for services has transferred or sold non-exempt assets within the last 36 months prior to application for services, he/she must verify that

he/she received fair market value for the assets. Fair market value is the worth on the open market of the asset, at the time it was transferred or sold. If less than fair market value was received, the difference between the amount received for the asset and the fair market value of the asset will be used in determining the individual's assets for the purpose of Section 682.200.

d) The transfer or selling of non-exempt assets at the time of application or while an individual's Home Services Program case file is open will result in the fair market value of the asset being used in determining the individual's assets for the purposes of Section 682.200.

(Source: Amended at 22 Ill. Reg. 2226, effective January 12, 1998)

Section 682.220 Exempt Assets

For the purpose of determining the amount of the individual's assets, as described in Section 682.200, the following assets shall be considered to be exempt and not counted:

a) the individual's primary residence, including its furnishings and contents and all contiguous property on which it is situated;

b) vehicles, except those used primarily for recreation;

c) personal property;

d) business or farming equipment which is necessary for the production of income;

e) life insurance including:

1) group life insurance held as a condition of employment or provided by an employer;

2) a prepaid burial plan with a value of up to $1,500; and/or

3) any life insurance policy with cash value, or redeemable face value of $2000, or less;

f) the principal of a trust if the trust document establishing the trust specifically states the principal cannot be impaired. HSP administration must be involved in any determination involving trust funds; and

g) In the case of a minor customer (Section 682.200(b)), the parents' pension funds are exempt assets. "Pension funds" are defined as funds held in individual retirement accounts (IRA) or in work-related pension plans or plans for self-employed individuals.

(Source: Amended at 24 Ill. Reg. 7724, effective May 12, 2000)

Section 682.230 Assets Held in Joint Ownership

a) If an asset is held in joint ownership with a non-spouse, the percentage of the asset owned by the individual shall be used to determine the value of the customer's share.

b) All assets of spouses will be considered joint assets and the value divided equally unless a written legal

agreement exists which designates the asset(s) to the other partner. In the case where a legal agreement exists, only the assets shared in common shall be considered.

(Source: Amended at 20 Ill. Reg. 6307, effective April 18, 1996)

Section 682.240 Income Allowances (Repealed)

(Source: Repealed at 24 Ill. Reg. 7724, effective May 12, 2000)

Section 682.250 Cost Sharing Provisions (Repealed)

(Source: Repealed at 24 Ill. Reg. 7724, effective May 12, 2000)

Section 682.260 General Exceptions to Cost Share Provisions (Repealed)

(Source: Repealed at 24 Ill. Reg. 7724, effective May 12, 2000)

SUBPART D: EFFECT OF OTHER SERVICES ON HSP

Section 682.300 Effect of Other Services on HSP

a) A customer cannot receive services through the HSP if he/she is receiving services through any other agency's home care program if that agency will seek

reimbursement for those services through a Medicaid Waiver.

b) A customer receiving services through a program described in subsection (a) above must terminate those services prior to the time any services may be provided through the HSP, pursuant to Medicaid regulations.

(Source: Amended at 23 Ill. Reg. 3981, effective March 19, 1999)

SUBPART E: REDETERMINATION OF ELIGIBILITY

Section 682.400 Redetermination Requirements

All customers receiving services through the HSP must have eligibility redetermined and must continue to meet all eligibility criteria as stated in Subparts B and C of this Part to continue to receive services through HSP.

(Source: Amended at 23 Ill. Reg. 3981, effective March 19, 1999)

Section 682.410 Redetermination Time Frames

a) Any customer served under the standard Medicaid Waiver shall have his/her eligibility redetermined whenever there is a change in his/her condition or situation that may affect his/her continued eligibility, but if no such change, at least every twelve months.

b) Any customer served under the Medicaid Waiver for Persons with AIDS shall have his/her eligibility

redetermined whenever there is a change in his/her condition or situation that may affect his/her continued eligibility, but if no such change, at least every six months.

c) Any customer served under the Medicaid Waiver for Persons with a Brain Injury shall have his/her eligibility redetermined whenever there is a change in his/her condition or situation that may affect his/her continued eligibility, but if no such change occurs, at least once every six months.

(Source: Amended at 25 Ill. Reg. 6278, effective May 15, 2001)

SUBPART F: GRANDFATHERING PROVISIONS

Section 682.500 Exceptions to Eligibility Standards

A customer who was receiving planned services through HSP prior to July 17, 1983, and has remained in a continuous active status since that time, and meets the current minimum DON point requirements may:

a) have a planned service cost above the SCM established for that customer's DON score as established July 17, 1983; and

b) have more than $10,000 in non-exempt, customer-only assets.

(Source: Amended at 24 Ill. Reg. 7724, effective May 12, 2000)

Section 682.510 Exceptions to Cost Sharing Provisions (Repealed)

(Source: Repealed at 24 Ill. Reg. 7724, effective May 12, 2000)

Section 682.520 Exceptions to Service Cost Maximums

a) If the established SCM for a case is exceeded due to a DHS-ORS approved provider rate increase, the customer may continue to receive the same amount of services even though the SCM will be exceeded.

b) If an increase in services is indicated, services must stay within the established SCM for the case, regardless of the impact of provider rates.

c) Cases involving ventilator dependent customers and other customers with exceptional care needs whose need for care cannot be met by the SCM may have a rate established by Department of Public Aid (DPA) per 89 Ill. Adm. Code 684.70(c).

(Source: Amended at 24 Ill. Reg. 7724, effective May 12, 2000)

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 683 APPLICATION PROCESS (REPEALED)

SOURCE: Repealed at 19 Ill. Reg. 5044, effective March 21, 1995.

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 684 SERVICE PLANNING AND PROVISION
SECTION 684.10 SERVICE PLAN

Section 684.10 Service Plan

a) All services to be provided to a customer through HSP must be necessary to meet an unmet care need of the individual or to provide relief to the caregiver for customers eligible for respite care services and listed on a HSP Service Plan which is developed for the customer, agreed to and signed by the customer and counselor.

b) Services provided through HSP to a customer must be:

1) safe and adequate;

2) cost effective; and

3) the most economical in terms of the customer's needs, unless a service is not available at the most economical level. In such instances, the next higher service level may be used as long as services remain within the SCM established for the customer. Documentation of an ongoing effort to locate services at the appropriate level must be in the customer's case file.

c) The initial HSP Service Plan for a customer must be submitted with all other necessary forms to the customer's physician during the eligibility determination phase of the case (89 Ill. Adm. Code 682.100(g)) for the purpose of review and approval of the plan for care by the physician.

(Source: Amended at 23 Ill. Reg. 6470, effective May 17, 1999)

Section 684.20 Procuring an Appropriate Service Provider

a) The counselor has the responsibility to identify the appropriate level of service provider based on the customer's approval of the initial service plan.

b) A customer has complete discretion in which Personal Assistant he/she wishes to hire, as long as the PA meets the conditions of Section 684.30. A customer is responsible for all stages of the interview and selection process, including the decision of which candidates to interview, the scope of the interview, whether to request a conviction background check, and the timing of the selection decisions. If requested by the customer, the counselor shall assist in identifying available resources for referral of Personal Assistant candidates for the customer to interview.

(Source: Amended at 23 Ill. Reg. 6470, effective May 17, 1999)

Section 684.30 Family Members as Service Providers

The following individuals shall not be paid through HSP to be a customer's service provider.

a) The customer's legally responsible family members (89 Ill. Adm. Code 676.30);

b) The customer's minor child (under age 18);

c) The customer's foster parents if the customer is under age 18; or

d) The customer's stepparents, if the customer is a minor child (under age 18).

(Source: Amended at 24 Ill. Reg. 2687, effective February 2, 2000)

Section 684.40 Distribution of the Service Plan

A copy of the approved HSP Service Plan for the customer must be given to the customer and each service provider, and a copy must be retained for the case file.

(Source: Amended at 23 Ill. Reg. 6470, effective May 17, 1999)

Section 684.50 Service Plan Content

The HSP Service Plan shall include the type of service(s) to be provided to the customer, the specific

tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, the rate of payment for the service(s), and, if the customer is receiving PA services, the customer's plan for backup if the usual PA is not available to provide the services and the next planned date for redetermination.

(Source: Amended at 23 Ill. Reg. 6470, effective May 17, 1999)

Section 684.60 Provision of Services

a) Except as provided in subsection (b) services shall not be provided to an eligible individual when he/she is:

1) hospitalized;

2) in a skilled nursing facility or intermediate care facility;

3) not residing in his/her home or non-institutional residence; or

4) outside the State of Illinois.

b) With prior approval by the HSP counselor or case manager, Personal Assistance services for customers who have been formally found eligible for services can continue when the individual is:

1) at his/her workplace; however a P.A. shall only be paid to provide personal care comparable to what is provided in the customer's home and not to perform occupational tasks;

2) away from his/her home or other non-institutional residence for a predetermined period; or

3) hospitalized, if the customer has a DON score of 75 or greater.

c) In these instances, the P.A. services, the number of hours of services and cost of services cannot exceed those contained in the customer's current service plan. P.A. services are limited to personal care of the customer. When away from the home, the customer shall provide notification of his/her temporary address to his/her HSP counselor or case manager.

(Source: Amended at 22 Ill. Reg. 18955, effective October 1, 1998)

Section 684.70 Service Planning Limitations

a) For customers served under a Medicaid Waiver program administered by DHS-DRS, all services listed on the Service Plan must be necessary to meet an unmet care need of the individual or, for respite cases, to provide relief to the caregiver, and must be within the SCM for the DON score attained by the customer as a result of the determination or redetermination of eligibility.

b) Customers who cannot be served under the HSP waiver programs' SCM and who meet the criteria established by HFS, may be eligible for an exceptional care rate (89 Ill. Adm. Code 140.569(a)(2)). The monthly cost of these services provided through the Home Services Program shall not exceed the exceptional care rate.

(Source: Amended at 31 Ill. Reg. 433, effective December 29, 2006)

Section 684.75 Required Physician's Certification of HSP Service Plan

a) A Physician's Certification (IL 488-1780) shall be obtained from the customer's physician when:

1) the customer's initial service plan is developed (Section 684.10); and

2) at least every two years during the redetermination of eligibility.

b) The services provided to the customer shall not be interrupted while the new Physician's Certification is being secured by DHS-DRS/HSP.

(Source: Amended at 31 Ill. Reg. 433, effective December 29, 2006)

Section 684.80 Interim Services

Prior to determination of eligibility (89 Ill. Adm. Code 682), the customer may receive interim services while an official determination of eligibility (89 Ill. Adm. Code 682) is being completed if enough information exists to presumptively establish eligibility based on:

a) DON score;

b) evidence of a disability as described at 89 Ill. Adm. Code 682.100(e) based on medical documentation,

counselor observation, or oral information received from a knowledgeable medical professional;

c) the customer's financial eligibility, per 89 Ill. Adm. Code 682: Subpart C;

d) the customer's meeting all eligibility criteria as listed in 89 Ill. Adm. Code 682; and

e) written or verbal approval of the interim service plan from the customer's physician, or neuro-psychologist for a person with brain injury, based upon the appropriateness and safety of the interim service plan agreed to and signed by the customer and the counselor.

(Source: Amended at 23 Ill. Reg. 6470, effective May 17, 1999)

Section 684.90 Coordination of HSP and Other Services

a) No HSP services may be provided to an individual who is a student under the age of 21 during the hours covered by the individual's Individualized Education Plan (IEP). Services for which the customer is determined eligible through HSP may be provided during the period the customer is not receiving services through his/her IEP.

b) Customers receiving services through HSP must, at the earliest possible date, apply for and accept, if eligible, all other benefits which may affect HSP eligibility or services.

c) All individuals applying for HSP services must apply for, and have an eligibility determination made for, Medicaid benefits through DPA. Customers in an active service status prior to October 1, 1991, may choose to apply for Medicaid.

(Source: Amended at 24 Ill. Reg. 10220, effective June 27, 2000)

Section 684.100 Denial or Termination of HSP Services

HSP services shall be denied or terminated and case closure initiated at any time the customer:

a) moves from the State of Illinois or cannot be located or contacted;

b) is determined to have a projected service cost above that of the projected cost of institutionalization, with the exceptions found at 89 Ill. Adm. Code 682.500(a), 682.520, and 684.70(c);

c) refuses services or further services;

d) dies;

e) is institutionalized and not expected to be released for a period to exceed 60 calendar days;

f) has been referred to another agency for the same or similar services and no longer requires or is eligible for HSP services;

g) fails to conduct himself/herself in an appropriate manner (e.g., physical, sexual or repeated verbal abuse by a customer against a DHS employee, provider or agent providing services through HSP; knowingly provides false information; or performs illegal activity that would directly and adversely affect the HSP);

h) is not, or is no longer, at risk of institutionalization due to improvement of his/her condition;

i) fails to meet other eligibility criteria as found at 89 Ill. Adm. Code 682 as a result of an initial determination of eligibility or redetermination of eligibility;

j) fails to cooperate (e.g., refuses to complete and sign necessary forms, fails to keep appointments, fails to maintain adequate providers); or

k) cannot have a safe and adequate service plan developed for him/her as a result of the original determination of eligibility or redetermination of eligibility.

(Source: Amended at 29 Ill. Reg. 16504, effective October 17, 2005)

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 685 NON-FINANCIAL ELIGIBILITY CRITERIA
(REPEALED)

SOURCE: Repealed at 19 Ill. Reg. 5082, effective March 21, 1995.

TITLE 89: SOCIAL SERVICES
CHAPTER IV: DEPARTMENT OF HUMAN SERVICES
SUBCHAPTER d: HOME SERVICES PROGRAM
PART 686 PROVIDER REQUIREMENTS, TYPE SERVICES,
AND RATES OF PAYMENT

SUBPART A: PERSONAL ASSISTANTS

Section 686.10 Personal Assistant (PA) Requirements

In order to be employed by a customer as a PA (89 Ill. Adm. Code 676.30(q)), an individual must:

a) have a Social Security number and provide DHS with documented verification of this number;

b) be a minor between 14 and 16 years of age who is not employed during school hours, has an employment certificate and meets all other requirements of the Child Labor Law [820 ILCS 205] and has an adult who is at least 21 years of age and who is legally responsible for the customer who will supervise the PA; be 16 years of age or older, enrolled in school and not employed during school hours; or be 17 years of age or older and not enrolled in school;

c) have provided to the customer at least two written or verbal recommendations from present or former

employers, the recommendation of a Center for Independent Living (CIL), or, if never employed, references from at least two non-relatives;

d) be able to communicate with the customer to the satisfaction of the customer and counselor;

e) be able to follow directions to the satisfaction of the customer and counselor;

f) have previous experience and/or training that is adequate and consistent with the specific tasks required for safe and adequate care of the customer;

g) if the customer has a contagious infectious disease, have a physician, health care institution (i.e., hospital, nursing home, home health agency), or CIL certify, in writing, that he/she has the knowledge of precautionary procedures for the control of contagious infectious diseases, if it is anticipated that he/she will come into contact with bodily fluids, or be evaluated by a Registered Nurse licensed pursuant to the Illinois Nursing and Nursing Practices Act of 1987 [225 ILCS 65] to determine that he/she has knowledge of such procedures;

h) complete an EMPLOYMENT AGREEMENT between the customer and PA that certifies the PA:

1) shall provide services to the individual in accordance with his/her SERVICE PLAN (IL 499-1049) (89 Ill. Adm. Code 676.30(u));

2) shall submit a bi-monthly calendar listing actual hours worked each pay period (1-15; 16-last

working day of the month), as verified by the customer and in accordance with the number of hours authorized by DHS. The PA shall not claim more hours than approved by DHS unless prior approval has been granted by the counselor to address a temporary increased service need;

3) shall make available to DHS and other designated agencies those records described in subsection (h)(2);

4) shall maintain all customer information as confidential and not for release, either in writing or verbally, to anyone other than those designated by DHS in writing;

5) shall not subcontract to any other person, any of the services he/she has agreed to provide;

6) shall provide services only while the individual is in his/her home or during the period covered by Section 684.60 (Provision of Services);

7) shall agree that the customer is responsible for locating, choosing, employing, supervising, training, and disciplining as necessary the PA. Further, that the State of Illinois does not provide paid vacation, holiday, or sick leave; however, such absences shall be reported to the DHS counselor per the HOME SERVICES TIME SHEET (IL 488-2251) only for the purposes of processing payment;

8) understands that DHS reports all payments made to a PA to the Illinois Department of Employment Security (DES) and that the PA may apply for

unemployment benefits, but DES, not DHS, makes the determination as to whether the PA shall receive benefits;

9) understands that he/she may apply for Workers' Compensation benefits through DHS and that some customers may carry such insurance coverage; however, DHS maintains that the customer, not DHS, is the employer for these purposes; and

10) understands that DHS will withhold Social Security tax (FICA) from payments made to him/her. Federal and State income tax shall be withheld if the PA completes and returns to DHS two separate W-4 forms;

i) complete an I-9 Immigration form, which must be retained by the customer;

j) for PAs starting on or after April 13, 1992, complete a PA STANDARDS (IL 488-2112) to be returned to DHS;

k) as of April 13, 1992, at the time of redetermination of eligibility of the customer by which he/she is employed, have completed by the customer, a PERSONAL ASSISTANT EVALUATION (IL 488-2089); and

l) if requested by the customer, give permission and the necessary information for the customer to request a conviction background check from the Illinois State Police. This permission will require the prospective PA to sign the appropriate form provided by the customer.

(Source: Amended at 26 Ill. Reg. 3994, effective February 28, 2002)

Section 686.20 Services Which May Be Provided by a PA

A PA may perform or assist with:

a) household tasks, shopping, or personal care;

b) incidental health care tasks which do not require independent judgement, with the permission of the customer's physician, customer, and/or family; and

c) monitoring to ensure the health and safety of the customer.

Section 686.25 Criminal Background Check

a) A Home Services Customer may require any PA candidate to submit to a criminal background investigation and to successfully complete a criminal background investigation as a condition of being selected as the PA to that Customer.

b) In the event that a customer elects to require a PA candidate to submit to a criminal background investigation, the customer shall be obligated only to inform DHS/ORS of his/her decision and DHS/ORS will provide the Customer an appropriate form that the Customer may file with the Illinois State Police to initiate the criminal background investigation. The results of the criminal background investigation will be sent directly to the customer, and the customer shall

have no obligation to share the results of the investigation with DHS-ORS. Nothing contained in this Section shall restrict a customer from extending a conditional offer of employment to any PA candidate pending the results of the background investigation.

(Source: Amended at 26 Ill. Reg. 3994, effective February 28, 2002)

Section 686.30 Annual Review of PA Performance

a) Pursuant to 686.10(k), annually, at the time of redetermination of the individual's eligibility, a Personal Assistant Evaluation (IL 488-2089) shall be completed, by the customer with assistance of the counselor, for each PA providing services through HSP.

b) PAs shall be evaluated based upon:

1) accuracy of work (e.g., ranging from making many errors to few errors);

2) cleanliness of working area (e.g., ranging from very untidy to exceptionally clean);

3) use of work time (e.g., ranging from very wasteful to very efficient);

4) responsibility (e.g., ranging from irresponsible to responsible);

5) attendance (e.g., ranging from frequently absent or late to always prompt); and

6) attitude towards the customer (e.g., ranging from disrespectful to respectful).

c) The outcome of the evaluation shall be mediated by the counselor between the PA and the customer regarding any unresolved issues, up to and including replacement of the PA by the customer, if necessary.

Section 686.40 Payment for PA Services

a) PAs shall be paid at the hourly rate set by law, but never less than the current federal minimum wage.

b) PAs shall be paid twice each month for services rendered. The first payment shall be for any services rendered by the PA, pursuant to the customer's Service Plan, from the first day of the month through the fifteenth day of the month. The second payment shall be for any services rendered by the PA, pursuant to the customer's Service Plan, from the sixteenth day of the month through the last day of the month.

c) No PA shall be reimbursed by DHS-DRS for services rendered to one or more HSP customers for more than 16 hours in a 24-hour period. The counselor may grant an exception should an emergency occur that results in the loss of a paid or unpaid primary caregiver who resides with the customer, and there is imminent danger to the health, safety and well being of the customer. When this occurs, the additional hours may not exceed the annual service cost maximum (SCM). The 16-hour limitation does not apply to PAs providing respite services.

(Source: Amended at 29 Ill. Reg. 16508, effective October 17, 2005)

RESPONDENT'S BRIEF

No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS *et al.*,
Petitioners,
v.
PAT QUINN, Governor of Illinois, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS AFSCME COUNCIL 31 AND SEIU LOCAL 73

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QUESTION PRESENTED

Whether a claim by homecare providers who are not represented by a union or required to pay fair-share fees, but who assert that their First Amendment associational rights would be infringed if in the future their bargaining unit should opt in favor of union representation and negotiate a collective bargaining agreement requiring fair-share fees, was correctly dismissed as not ripe for adjudication.

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IN THE

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PAMELA HARRIS *et al.*,
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v.
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS AFSCME COUNCIL 31 AND SEIU LOCAL 73

Respondents AFSCME Council 31 and SEIU Local 73 were named as defendants in this litigation as a result of their attempt to organize homecare providers in Illinois' Home Based Support Services Program ("Disabilities Program"), notwithstanding that their efforts proved unsuccessful when these providers voted against representation by either union. After the District Court and the Court of Appeals dismissed Petitioners' claims against these two defendants as not ripe for adjudication, Petitioners sought and obtained certiorari on the question whether that holding was erroneous. As we show in this brief, the holding of the courts below was correct and should be affirmed.

In the alternative, should the Court believe that the claims against AFSCME Council 31 and SEIU Local 73 are justiciable, the judgment in their favor should be affirmed on the basis of the Seventh Circuit's holding on the merits with respect to the separate Rehabilitation Program bargaining unit. AFSCME Council 31 and SEIU Local 73, while addressing in this brief only the ripeness issue, therefore join in full the Brief of Respondent SEIU Healthcare Illinois & Indiana and incorporate the argument therein as an alternative ground for affirming the judgment in their favor.

STATEMENT

Illinois operates its Disabilities Program – like the Rehabilitation Program a Medicaid waiver program – "to provide alternatives to institutionalization of mentally disabled adults and to permit these individuals to live in their own homes." 405 Ill. Comp. Stat. 80/2-4. Like customers in the Rehabilitation Program, customers in the Disabilities Program develop a "service/ treatment plan" in conjunction with a State agency "service facilitator." Ill. Admin. Code tit. 59, §§ 117.120, 117.225(a). If the service plan includes personal care services by an individual provider, the State pays the provider for the provision of such services. *Id.*, § 117.215.

In 2009, Governor Quinn issued Executive Order 2009-15, which authorized the State to recognize and bargain collectively with a representative chosen by a majority of the providers in the Disabilities Program ("Disabilities Providers"). Petition Appendix ("Pet. App.") 48a. Two labor organizations, SEIU Local 73 and AFSCME Council 31, competed in a mail ballot election in October 2009 to become the representative

of the approximately 4,500 Disabilities Providers. Joint Appendix ("J.A.") 21, 26 (Compl. ¶¶ 18, 32.) The providers, however, voted against representation by either organization. J.A. 27 (Compl. ¶ 36). As a result, there is no collective bargaining representation, collective bargaining agreement, or fair-share requirement for Disabilities Providers.

Notwithstanding the Disabilities Providers' vote against union representation, Petitioners – most of whom are providers in the Disabilities Program, *see* J.A. 17-18 (Compl. ¶ 3) – included as part of their Complaint the allegation that these providers were "subject to an actual and ongoing threat of being compelled ... to support" a labor organization. J.A. 27-28 (Compl. ¶ 37). The District Court dismissed that claim for lack of subject matter jurisdiction, on both ripeness and standing grounds. As these petitioners were not represented by a union and were not required to pay fair-share fees, they could not demonstrate any "injury-in-fact." Pet. App. 38a-39a. And, to the extent Petitioners contended that such an injury was threatened, it depended on "too many 'future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* at 37a.

On appeal, the Seventh Circuit affirmed that judgment (except to the extent that the Disabilities Providers' claim should have been dismissed without prejudice), because "[t]he plaintiffs' claims are contingent on events that may never occur and thus are not ripe." *Id.* at 15a. Rejecting Petitioners' argument that the mere existence of the Executive Order authorizing collective bargaining "makes it significantly

more likely that the plaintiffs will be forced to financially support" a union, *id.*, the court also found Petitioners' contention that they would have to devote time and money to combat any future union organizing efforts insufficient to create a claim that was ripe for adjudication:

> The plaintiffs feel burdened fighting to prevent what they view as an unconstitutional collective bargaining agreement. But many individuals and organizations spend considerable resources fighting to prevent Congress or the state legislatures from adopting legislation that might violate the Constitution. The courts cannot judge a hypothetical future violation in this case any more than they can judge the validity of a not-yet-enacted law, no matter how likely its passage. To do so would be to render an advisory opinion, which is precisely what the doctrine of ripeness helps to prevent.

Id. at 16a.

SUMMARY OF THE ARGUMENT

The issue whether the Disabilities Providers present a justiciable case or controversy is controlled by the well-established principle that "[a] claim is not ripe for adjudication if it rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all."'" *Texas v. United States*, 523 U.S. 296, 300 (1998). That a party is not required "to await the consummation of threatened injury to obtain preventive relief" does not mean that the party has standing to sue – let alone a claim that is ripe for adjudication – where the threatened injury is not "cer-

tainly impending." *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Here, it is undisputed that the First Amendment injury Petitioners allege will not occur unless, at some point in the future, a majority of the Disabilities Providers opts for union representation. Nor does Petitioners' argument that they may in the future choose to spend resources in an effort to prevent that from happening suffice to create a justiciable claim.

ARGUMENT

In asking the Court to reverse the holding below that the claims of the Disabilities Providers are not ripe for adjudication, Brief for Petitioners ("Pet. Br.") 56-58, Petitioners do not and cannot contend that these providers have suffered any actual injury, or that such injury is certain – or even likely – of occurrence. It is, rather, undisputed that the Disabilities Providers will not be required to pay fair-share fees, be subject to a collective-bargaining agreement, or be represented by a union, unless a series of contingencies occurs – including, in particular, a renewed effort by AFSCME Council 31, SEIU Local 73, or some other union to organize these providers, the endorsement of the union as exclusive bargaining representative by a majority of the providers (who previously have rejected union representation), and (with regard to fees) negotiation of a collective bargaining agreement containing a fair-share requirement. Whether any of these contingencies will occur at some time in the future is, as the Seventh Circuit observed, wholly uncertain. Pet. App. 15a.

The beginning and end of the analysis, therefore, lies in the well-established rule – which Petitioners do not address, or even acknowledge – that "[a] claim is not ripe for adjudication if it rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all."'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

Petitioners instead cite *Babbitt v. United Farm Workers*, 442 U.S. 289 (1979), for the uncontroversial proposition that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Id.* at 298. But in doing so they ignore the *Babbitt* Court's explanation, in the immediately following sentence, that a not-yet-consummated injury is sufficient to make a claim justiciable only "[i]f the injury is *certainly impending*." *Id.* (emphasis added).

This Court said the same thing just last Term in the other principal case on which Petitioners rely. In *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), the Court emphasized that it had "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Id.* at 1147 (emphasis supplied by Court) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), and citing additional cases).

Petitioners do not and cannot suggest that the injury of which they complain is certainly impending – or anything even remotely close to that. What they assert, rather, is that as a result of Executive Order 2009-15 the Disabilities Providers "are subject to an 'actual

and ongoing threat' of being unionized." Pet. Br. 57.[1] But that is far from a sufficient basis for ripeness, or even standing. Even granting that the Executive Order is the necessary precondition for unionization and thus makes it *possible* that the Disabilities Providers could at some point become subject to union representation, collective bargaining, and fair-share fees, the Court has made clear that this is not enough to create a justiciable controversy. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 730 (1998) (holding that a challenge to the legality of a forest management plan's logging provisions was not ripe, even though promulgation of the plan "makes logging more likely," and indeed was a "precondition" for logging, which "in its absence ... could not take place").

It is, in fact, undisputed that union representation, collective bargaining, and a fair-share requirement will occur only if a majority of the Disabilities Providers opts for union representation (and, with respect to fees, if the union then successfully negotiates a contract containing a fair-share provision). Accordingly, whether or not those providers will suffer the alleged constitutional injury of which they complain "re-

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[1] Petitioners rely for this point on the Eleventh Circuit's holding with respect to standing in *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286-91 (11th Cir. 2010), but that decision is of dubious value in light of this Court's recent dismissal as improvidently granted of the writ of certiorari in the *Mulhall* case, apparently due at least in part to doubts as to whether the plaintiff had standing to raise the claim on which the Court had granted certiorari. *See UNITE HERE Local 355 v. Mulhall*, No. 12-99, 571 U.S. ___, 2013 WL 6410851, at *1 (Dec. 10, 2013) (Breyer, J., dissenting).

quire[s] guesswork as to how independent decision-makers will exercise their judgment." *Clapper*, 133 S. Ct. at 1150. As the Court reaffirmed in *Clapper*, it has "decline[d] to abandon our usual reluctance to endorse standing theories that rest on [such] speculation." *Id.*

Disregarding the substance and holding of the *Clapper* decision – and the fact that *Clapper* said nothing about ripeness but addressed only the issue of standing – Petitioners rest their argument on a footnote in which the Court recognized that in some cases standing had been found on the basis of "a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id.* at 1150 n.5 (citing, *inter alia*, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010)).[2] But *Clapper* squarely rejected the contention that standing – not to mention ripeness – could be predicated on a party's decision to "incur[] ... costs as a reasonable reaction to a risk of harm," when "the harm respondents seek to avoid is not certainly impending." 133 S. Ct. at 1151. *Clapper* thus forecloses Petitioners' attempt to create justiciability out of nothing more than the possibility that, "[i]f another election is requested, they will again have to 'expend time and money to prevent this infringement on their Constitutional rights.'" Pet. Br. 58. By Petitioners' logic, any-

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[2] *Monsanto* addressed a different issue – not whether a contingent event was or was not certain to occur, but rather whether *an event that had already occurred* (an agency action allowing the use of genetically modified seeds) impacted the plaintiffs in such a way that they had standing to sue. *See* 130 S. Ct. at 2754-55.

one who feared injury from the enactment of proposed legislation, and devoted resources to lobbying against it, would have standing to challenge the constitutionality of the legislation in advance of its enactment. As *Clapper* confirms, that is not the law.

Finally, Petitioners contend that the Disabilities Providers will suffer constitutional injury from the conduct of a representation election itself, regardless of its outcome. Pet. Br. 58. Of course, it is utter speculation even whether another representation election will ever be held. In any event, Petitioners offer no explanation as to how the mere fact that an election is conducted – as opposed to whatever injury they might suffer as a result of the election – constitutes a violation of any right protected by the First Amendment.[3]

* * *

The "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Union Carbide*, 473 U.S. at 580 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). In particular, the ripeness requirement furthers "the exercise of judicial restraint from unnecessary decision of constitutional issues." *Regional Rail Reorganiza-*

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[3] *Babbitt*, on which Petitioners rely, is not remotely on point. In that case the Court found justiciable a challenge to certain election *procedures*, prior to any election being held, where those procedures made it "futil[e]" for the union to seek an election. 442 U.S. at 300. Here the challenge is not to any election procedures, but rather to events that could transpire only *if* an election were held and *if* it resulted in a majority vote for union representation.

tion Act Cases, 419 U.S. 102, 138 (1974); *see also Ashwander v. TVA*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring) ("great gravity and delicacy" of ruling on constitutionality of legislation requires "rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies"). The courts below, applying legal principles that are beyond dispute, had no difficulty in recognizing that the Disabilities Providers' claims did not present a justiciable case or controversy. Petitioners offer no basis for departing from existing law on this issue, and the decision below accordingly should be affirmed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 11-681

IN THE
Supreme Court of the United States

PAMELA HARRIS, *ET AL.*,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether Illinois may require all personal assistants working in the State's Rehabilitation Program to bear their proportionate share of the costs incurred by their bargaining unit's collective bargaining representative for negotiating and enforcing a binding contract with the State that sets wages, benefits, and other employment terms for the bargaining unit.

2. Whether a First Amendment claim by other personal assistants was correctly dismissed on standing and ripeness grounds.*

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* The claim that gives rise to the second question presented involves only respondents other than SEIU Healthcare Illinois & Indiana (SEIU-HCII), and SEIU-HCII does not address that question in this brief

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENT SEIU HEALTHCARE ILLINOIS & INDIANA

STATEMENT

1. Background

a. Illinois' Medicaid-funded Home Services Program (Rehabilitation Program) provides care to individuals with disabilities in a home-based setting. 20 ILCS 2405/0.01 *et seq.*; 89 Ill. Admin. Code §676.10 *et seq.* The Program "prevent[s] the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State." 89 Ill. Admin. Code §676.10(a).

The Program delivers home-based care to its "customers" pursuant to individualized "service plans." *Id.* §676.30(b), (u). Illinois' Department of Human Services (Department) develops each customer's

service plan. *Id.* §§676.30(c), 684.10(a). Service plans list "the specific tasks involved, the frequency with which the specific tasks are to be provided, [and] the number of hours each task is to be provided per month." *Id.* §684.50.

The State pays more than 20,000 "personal assistants" to carry out these service plans. *Id.* §676.30(p); J.A. 20. Personal assistants perform "household tasks, shopping or personal care," "incidental health care tasks," and "monitoring to ensure health and safety." 89 Ill. Admin. Code §686.20. The State determines personal assistants' hourly wage and pays them directly, withholding income taxes. *Id.* §686.40(a)-(b). Customers do not pay personal assistants or set their wage rate. *Id.* §677.40(d); 42 C.F.R. §447.15.

Customers select and supervise personal assistants, subject to State restrictions. 89 Ill. Admin. Code §677.200(g). The State requires that personal assistants meet minimum age requirements, provide recommendations, have previous experience or training, and satisfy a Department counselor that they can adequately communicate and follow directions. *Id.* §686.10. The State bars customers from hiring their spouses or minor children. *Id.* §§676.30(m), 684.30. The State requires that each customer and personal assistant sign a State-drafted employment agreement, and that customers annually evaluate personal assistants under the guidance of a Department counselor. *Id.* §§686.10(h), 686.30. The counselor mediates disputes between customers and personal assistants. *Id.* §686.30(c). The State can effectively fire personal assistants by disqualifying them from the Program. J.A. 55-56.

b. Illinois' Public Labor Relations Act (PLRA), 5 ILCS 315/1 *et seq.*, declares it "the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives ... for the purpose of negotiating wages, hours, and other conditions of employment." *Id.* 315/2.

Under the PLRA, a majority of public employees in a bargaining unit may choose a labor organization to be the unit's "exclusive representative" for contract negotiations about employment terms. *Id.* 315/3(f), 315/6(c), 315/9. The PLRA representative is "responsible for representing the interests of all public employees in the unit," and any collective bargaining agreement must "contain a grievance resolution procedure which shall apply to all employees in the bargaining unit." *Id.* 315/6(d), 315/8. A collective bargaining agreement may include a "fair share" provision that requires all bargaining unit employees to bear "their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and conditions of employment, but not to exceed the amount of dues uniformly required of [union] members." *Id.* 315/3(g), 315/6(e). The State automatically deducts this amount from non-member employees' wages. *Id.* 315/6(e).

c. In the mid-1980s, personal assistants (then called "housekeepers") organized a union and petitioned for recognition of their representative under the PLRA. Pet. App. 4a. A hearing officer with the Illinois State Labor Board found that the State and the customers functioned as personal assistants' "joint employers" and concluded that, because the Board lacked jurisdiction over customers, the PLRA did not

cover those employees. D.Ct. Doc. 32-7 at 2.[1] On appeal, the Board did not "reach[] the specific conclusions of the Hearing Officer as to the joint employer status," but agreed that, given personal assistants' "unique" employment relationship, the State is not "their 'employer' or, at least, their sole employer" for PLRA purposes. *Id.* at 2-3.

In 2003, the Illinois General Assembly amended the PLRA to cover labor relations between the State and the Rehabilitation Program personal assistants. Public Act 93-204 (D.Ct. Doc. 32-10). By that time, the Program's growth had greatly increased the importance of retaining the workforce needed to provide this less expensive alternative to institutional care.[2] Under the amendments, the personal assistants are "[p]ublic employee[s]" and the State is their "public employer" for purposes of collective bargaining "limited to the terms and conditions of employment under the State's control." 5 ILCS 315/3(n)-(o), 315/7. The amendments provide that personal assistants are not considered public employees for other purposes, including tort liability and state retirement and health benefits. *Id.* 315/3(n).

The same statute amended the Disabled Persons Rehabilitation Act to provide that "[t]he State shall engage in collective bargaining ... concerning ... terms

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[1] The report stated that customers were then responsible for paying part of personal assistants' wages, and reasoned that customer participation was needed to "effectively negotiate economic ... terms ... of employment." D.Ct. Doc. 32-7 at 13. Illinois is now solely responsible for all compensation.

[2] By 2003, the Program provided services to 28,926 individuals with disabilities, compared with 1,256 in 1979. Illinois Home Services Program, Annual Report 2009, http://www.dhs.state.il.us/page.aspx?item=52254.

and conditions of employment that are within the State's control," but collective bargaining shall not "limit the right of the persons receiving services ... to hire and fire ... personal assistants ... or to supervise them within the limitations set by the ... Program," including those in individualized service plans. 20 ILCS 2405/3(f).

These statutory amendments occurred shortly after the Governor issued Executive Order 2003-8, directing State officials to allow Rehabilitation personal assistants to decide whether to designate a representative for collective bargaining with the State. Pet. App. 45a-47a. The Order explained that "each [customer] employs only one or two personal assistants and does not control the economic terms of their employment ... and therefore cannot effectively address concerns common to all personal assistants," and that recognition of a representative would "preserve the State's ability to ensure efficient and effective delivery of personal care services." *Id.* at 45a-46a.

Based on a showing of majority support among Rehabilitation personal assistants, SEIU Healthcare Illinois & Indiana (SEIU-HCII) was designated the bargaining unit's PLRA "exclusive representative." *Id.* at 4a-5a, 22a.

SEIU-HCII and Illinois executive branch officials have since negotiated and entered into three successive collective bargaining agreements (CBAs) covering employment terms for personal assistants. 2003-2007 CBA (D.Ct. Doc. 32-4); 2008-2012 CBA (J.A. 35-60); 2012-2015 CBA.[3] Negotiations occur in

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[3] The current CBA is available on the Illinois Department of Central Management Services website at http://www2.illinois.gov/

private sessions exempt from Illinois' Open Meetings and Freedom of Information Acts. 5 ILCS 120/2(c)(2), 140/7(1)(p). The principal subjects covered by the CBAs thus far have included:

Wages: The CBA sets hourly wage rates. Wages are currently $11.65 per hour, and will increase to $13.00 per hour on December 1, 2014. CBA, Art. VII, §1. Before the initial CBA, the wage was $7.00 per hour. 2003-2007 CBA (D.Ct. Doc. 32-4), Art. VII.

Payment Practices: The CBA provides that "the State and the Union shall work together to identify causes of and solutions to problems resulting in late, lost or inaccurate paychecks," CBA, Art. X, §4, a serious problem in this dispersed 20,000-person unit working varied and often irregular hours.

Health Benefits: The CBA provides for health benefits through a fund designed and administered by the union, subject to State audit. Art. VII, §2. The State's contribution to the fund is $0.75 per hour for 2012-2013, for an annual contribution of $27 million. *Id.*

Training: The CBA establishes a State-funded Personal Assistants Training Program administered jointly by the State and SEIU-HCII "to improve the quality of care." Art. IX, §1, pp. 18-22, Side Letter (Dec. 16, 2013) pp. 1-2 (mandatory training).

Orientation: The CBA provides for personal assistants to complete an orientation to the Program, for the State to pay them for attendance, and for a joint labor-

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cms/Employees/Personnel/Documents/emp_seiupast.pdf. Unless otherwise specified, citations are to the current CBA.

management committee to develop the content and schedule. Art. IX, §1.

Background Checks: The CBA provides for the State's implementation of pre-hire criminal background checks. Side Letter (Dec. 16, 2013) pp. 2-3.

Health and Safety: The CBA establishes a joint committee on health and safety issues. Art. IX, §1. It also requires the State to provide gloves to personal assistants, requires personal assistants to notify the State if injured while performing services, and requires the State to provide paperwork to document injuries. *Id.* §§2, 3.

Grievance Procedures: The CBA establishes a grievance procedure that culminates in binding arbitration to handle payment and other contractual disputes. Art. XI. Pursuant thereto, when the State disqualified a personal assistant from the Program based on allegations lacking credibility, SEIU-HCII obtained an arbitration order reversing the decision. *See* D.Ct. Doc. 32-5.

Registry: The CBA creates a registry for customers to locate bargaining unit members and for bargaining unit members to find work. CBA, Side Letter (Dec. 16, 2013) p. 3; J.A. 57-58.

No Strikes: The CBA prohibits strikes and work stoppages. CBA, Art. XII, §5.

Union Dues/Fair Share: The CBA provides for deduction of union dues from members' wages, with written authorization, and for deduction of fair-share payments from the wages of non-members. Art. X, §§5, 6.

The CBAs are limited to employment terms within the State's control, the legally-authorized scope of

bargaining. The CBAs confirm the State's authority to make policy decisions concerning Program operations. Art. V.

2. Proceedings Below

Three of the petitioners are personal assistants paid to care for individuals with disabilities enrolled in the Rehabilitation Program. These petitioners filed suit against the State and SEIU-HCII alleging that the CBA's fair-share provision violates their First Amendment rights. J.A. 30-31. They sought a judgment rescinding that provision and requiring a refund of fair-share fees. J.A. 32-33.

The district court dismissed the Rehabilitation petitioners' claims, recognizing that "employees can be required to contribute fair share fees to compensate unions for their representational activities." Pet. App. 28a. Since the State controls the key employment terms for personal assistants, pays them for their work, has "a vital interest in establishing peaceful labor relations with" them, and functions as their employer for purposes of collective bargaining, the fair-share provision fell within "longstanding Supreme Court precedent." *Id.* at 33a, 35a. The district court emphasized that "[t]here are no allegations that the fair share fees here are used to support any political or ideological activities." *Id.* at 35a.

The Seventh Circuit panel unanimously affirmed. As to the Rehabilitation petitioners, it began its analysis with the settled law that fair-share fees covering the costs of collective bargaining representation are permissible in the employment context. Pet. App. 7a-9a. The panel considered the Rehabilitation Program's operations and, "because of the significant control the state exercises over all aspects of the

personal assistants' jobs," had "no difficulty concluding that the State employs [the] personal assistants." *Id.* at 11a, 13a. Therefore, "the fair share fees in this case withstand First Amendment scrutiny—at least against a facial challenge to the imposition of the fees." *Id.* at 13a.

SUMMARY OF ARGUMENT

Illinois' requirement that all personal assistants in its Rehabilitation Program bear their proportionate share of the costs of negotiating and administering a collective agreement to establish basic terms for their employment in that State program complies with well-established law. "The First Amendment permits the government to require both public sector and private sector employees" to "pay a service fee to the local union that acts as their exclusive bargaining agent." *Locke v. Karass*, 555 U.S. 207, 209, 213 (2009); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977). The same principle permits mandatory fees in other contexts, including dues for integrated bar associations. *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-16 (1990). The claim here, which challenges only this core fair-share fee obligation, presents no reason to reconsider that well-established and long-standing law.

I. This Court has already considered and rejected petitioners' arguments that exclusive collective bargaining representation and fair-share fees violate the First Amendment. This Court has also placed protective limits (barely acknowledged by petitioners) on both the meaning of "exclusive" representation and the scope of fair-share fees to ensure they comply with the First Amendment. Petitioners do not allege here that those limitations were transgressed.

Petitioners criticize the Court's well-settled precedents on this issue for failing to apply strict scrutiny, but the Court's deference to legislative judgments about the importance of systems of exclusive representation and fair-share fees to stabilized labor relations is consistent with settled First Amendment principles. A collective bargaining unit, whether in the private or public sector, is a predominantly economic and commercial association, not a predominantly expressive association, and strict scrutiny does *not* apply to the regulation of commercial or economic associations, including labor regulation. *See, e.g., Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring). Moreover, strict scrutiny certainly does *not* apply to the government's dealings with its employees and contractors in pursuing efficient workforce management. *See, e.g., Borough of Duryea v. Guarnieri,* 131 S.Ct. 2488, 2500 (2011); *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 556, 564-67 (1973). That is the context of this case, where the State seeks to develop and maintain a stable workforce committed to service within a State program.

Abood's holding that neither exclusive representation nor fair-share fees violate the First Amendment is consistent with these precedents. Use of exclusive representation as a tool for determining basic employment terms promotes the government's significant interest in stabilized labor relations through a highly regulated system of *economic* association, and the system's impact on public employees' First Amendment rights is limited. Fair-share fees serve the government's significant interests in ensuring the vitality of that system, preventing unfairness to other employees, and eliminating incentives to "free ride" on

other employees' efforts. The government has an overriding interest in preventing free riding in this context because the government itself creates the free rider problem by mandating that the exclusive representative represent *all* employees in the unit. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring and dissenting). At the same time, the First Amendment burdens of the system are minimized by limits on the permissible scope of fair-share fees, which confine them to costs germane to contract negotiation and administration.

II. *Abood* controls the outcome here. Illinois retains the authority to set employment terms for its personal assistant workforce. As the Seventh Circuit held, the State is the personal assistants' joint employer. Like joint employers in the private sector, the State can and does engage in meaningful collective bargaining with the personal assistants' representative, and the system of exclusive representation serves the State's interest in stabilized labor relations by establishing a process of structured give-and-take with the workforce, through a representative, so as to negotiate a single satisfactory contract for the entire unit.

Even if the Seventh Circuit was wrong about the common-law status of Illinois' relationship with the personal assistants, however, the State's significant and legitimate interests as proprietor are not limited by such formalities, *see NASA v. Nelson*, 131 S.Ct. 746, 758-59 (2011); *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 679-80 (1996), and those interests justify the system of exclusive representation and fair-share fees here. The Illinois Legislature was entitled to conclude that addressing workforce-wide issues through collective bargaining would best ensure

the success of the State's program and thereby save the State the greater expense of providing care to individuals with disabilities in institutionalized settings. Labor disruptions, poor morale, high turnover, or workforce shortages would significantly undermine the State's program, and individual "customers" have neither the interest nor the ability to address workforce-wide issues, such as wage rates, benefits, grievance procedures, trainings, and orientations. The State's substantial interests in building and maintaining the overall workforce are wholly consistent with the State's policy decision to delegate limited authority to customers to select and supervise their own personal assistants.

Petitioners' proposed "limits" on *Abood* should similarly be rejected. They are vague, unadministrable, and neither reflect the important interests at issue nor otherwise flow from this Court's First Amendment decisions.

ARGUMENT

Illinois has a paramount proprietary interest in providing Rehabilitation Program customers with disabilities with high-quality, customer-directed homecare services that prevent unnecessary and more expensive institutionalization. This Program relies upon a workforce of more than 20,000 personal assistants whom the State pays to care for customers. As a policy matter, Illinois delegates to individual customers the authority to select and, within limitations, supervise their own personal assistants. But Illinois retains authority to set all economic terms of employment for this workforce.

After Program workers organized and demanded recognition of their union, the Legislature extended collective bargaining rights under the Illinois PLRA to this workforce. Their basic employment terms have since been established in three successive CBAs. Those CBAs resulted in wage increases, health benefits, training, and a dispute resolution process. The CBAs also created ongoing labor-management committees to explore solutions to other workforce problems. The union enforces the contract for all workers, and plays a role in administering some of its provisions. The CBAs do not go beyond setting basic employment terms or interfere with customer autonomy. Rather, by producing CBAs that develop mutually agreed upon means of making work within the Program more attractive, collective bargaining helps expand the pool of qualified workers available for customers and helps the State retain those workers, improving the Program's efficiency.

Illinois' system complies with well-established law governing collective bargaining and fair-share fees. The Court's unanimous decision in *Locke v. Karass*, 555 U.S. 207, 209, 213 (2009), recognized the long-settled "general First Amendment principle" that "[t]he First Amendment permits the government to require both public sector and private sector employees" to "pay a service fee to the local union that acts as their exclusive bargaining agent." *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977). The same principle permits the government to require attorneys to join and pay dues to integrated bar associations, *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-16 (1990), and growers to pay fees to agricultural cooperatives that collectively set production terms. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457,

473-74 (1997); *see United States v. United Foods*, 533 U.S. 405, 413-15 (2001).

Petitioners challenge the requirement that all Rehabilitation Program personal assistants bear their share of the basic costs of collective bargaining negotiations and contract administration. They do not allege that the scope of the fair-share fee exceeds the constitutional limits identified in this Court's decisions, nor do they challenge any procedures for collecting the fees, nor must non-members here "opt-out" of paying for non-chargeable expenditures. *Cf. Knox v. SEIU, Local 1000*, 132 S.Ct. 2277 (2012). Although petitioners' brief refers in strong language to union "lobbying" and "petitioning" about "matters of public concern," those phrases are merely assertions that they should not be required to fund *any* efforts to establish the terms of a public contract through collective bargaining or *any* contract administration—a proposition this Court has repeatedly rejected. *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 524 (1991); *id.* at 552-53, 556-57 (Scalia, J., concurring and dissenting); *Abood*, 431 U.S. at 227-32. The CBAs here encompass only basic employment terms, and contract negotiations are conducted with state agency officials in private sessions that are not subject to Illinois' open-meetings laws. *See* 5 ILCS 120/2(c)(2), 140/7(1)(p).

Petitioners' claim therefore depends upon establishing that the "general First Amendment principle[s]" recognized in *Locke*, 555 U.S. at 213, and prior cases do not apply. Below, petitioners argued that particular aspects of their employment relationship merited that result. Here, petitioners attack decades of well-established First Amendment decisions addressing exclusive collective bargaining representation

and fair-share fees, arguing that they were not carefully considered and should be overturned. But petitioners misrepresent this well-developed body of First Amendment law, ignoring the rationales of the decisions and the limitations they adopt to ensure consistency with the First Amendment.

The Court's prior decisions are part of, not at odds with, the general body of First Amendment law—much less *so at odds* as to justify overruling these long-established precedents. These precedents apply fully here, where the government acts as proprietor of its own program, retains its authority to set all economic terms for the workforce carrying out its program, and engages in collective bargaining to reach a binding contract establishing those basic workforce employment terms.

I. THE GOVERNMENT MAY USE A SYSTEM OF EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATION AND FAIR-SHARE FEES TO SET EMPLOYMENT TERMS FOR ITS WORKFORCE

A. Exclusive Representation Is Consistent With The First Amendment

Petitioners' principal contention is that the use of exclusive collective bargaining representation in the public sector—i.e., including public employees in a bargaining unit subject to uniform employment conditions negotiated by a bargaining agent selected by a majority of that bargaining unit's members—

violates the First Amendment.[4] This Court has fully considered and rejected these arguments before, and has imposed significant limitations (largely ignored by petitioners) on exclusive representation systems to ensure consistency with the First Amendment.

1. Exclusive collective bargaining representation is a system that regulates the economic relationship between an employer and its workforce. Under that system: (1) the majority of employees in a bargaining unit may select a representative to engage in collective bargaining about employment terms; (2) if this occurs, the chosen representative becomes the "exclusive representative" for collective bargaining purposes; (3) the representative has a duty to bargain "in good faith" with the employer regarding employment terms within the legally-authorized scope of bargaining and to reduce any agreement to an enforceable contract; and (4) the representative must represent the interests of *all* unit employees, whether or not union members, in bargaining and enforcement. *See* 5 ILCS

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[4] Petitioners' Complaint did not challenge the designation of an exclusive bargaining representative for the Rehabilitation petitioners, only the requirement that they bear their share of the costs of representation. *See* J.A. 30. Petitioners' Complaint sought rescission of the fair-share provision, not the whole CBA or the recognition of an exclusive representative. J.A. 32-33; *see* Pet. App. 5a n.2 ("[T]he constitutional claim in this appeal is confined to the payment or potential payment of the fair share requirement."). Thus, the relief petitioners now seek from this Court—that "the case [be] remanded with instructions to find Illinois' exclusive representation laws unconstitutional" (Pet. Br. 56)—goes well beyond that sought in their Complaint, as does petitioners' principal argument that exclusive collective bargaining representation itself violates the First Amendment (Pet. Br. 23-33, 37-48).

315/6(c)-(d), 315/7, 315/10(b)(4), (8); *see also* 29 U.S.C. §§157, 158(b)(3), (d), 159(a); *Ford Motor v. Huffman*, 345 U.S. 330, 337-38 (1953).

By the time *Abood* rejected a First Amendment challenge to the use of such a system in public employment, it was well-accepted that the "principle of exclusive union representation" through majority rule (431 U.S. at 220) best promotes stabilized labor relations. Congress adopted exclusive representation for private-sector employees and employers in the Railway Labor Act (RLA) and National Labor Relations Act (NLRA). *Abood*, 431 U.S. at 220; *Emporium Capwell v. W. Addition Cmty. Org.*, 420 U.S. 50, 62-64 (1975); *Steele v. Louisville & N.R.*, 323 U.S. 192, 199-202 (1944). Even earlier, the exclusive representation principle was "adopted in substantially similar form by every important national board ever created for the continuing regulation of labor relations." Note, *The Decisions of the National Labor Relations Board*, 48 Harv. L. Rev. 630, 637 & n.56 (1935).

The judgment of policymakers, based on experience over many decades and industries, has been that exclusive representation best promotes stabilized labor relations, with all the consequent benefits, because it "avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment," "frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Abood*, 431 U.S. at 220-21; *see Emporium Capwell*, 420 U.S. at

68-70.[5] Collective bargaining systems involving multiple, competing unions and a single employer are used in some other countries, but U.S. policymakers have not considered those less stable systems good models. *See, e.g.*, Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 50-53, 55-56, 60-61, 65-67 (1998).

2. Long before *Abood*, *Railway Employes v. Hanson*, 351 U.S. 225 (1956), rejected a First Amendment challenge to the RLA's use of exclusive representation and fair-share fees in the private-sector context. The Court reasoned that Congress could determine "that industrial peace and stabilized labor-management relations" are served by the union shop arrangement, that this is "a legitimate objective," and that, while "[m]uch might be said pro and con if the policy issue were before" the Court, "[t]he decision rests with the policy makers, not with the judiciary." *Id.* at 233-34. *Hanson*'s holding that exclusive representation and fair-share fees for "core" activities are consistent with the First Amendment was confirmed in *Machinists v. Street*, 367 U.S. 740, 749 (1961), which, to avoid "constitutional questions," narrowly interpreted the RLA's authorization for fair-

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[5] *See also* Sen. Report No. 573, 2 Leg. Hist. of the NLRA 2313 (1935) ("Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees."); House Report No. 1147, 2 Leg. Hist. of the NLRA 3070 ("There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides.").

share fees to prohibit collection of fees for political activities, while allowing them for collective bargaining purposes.

Petitioners are wrong that *Hanson* was just a Commerce Clause case. *Hanson* presented a First Amendment claim because the RLA preempted state laws that otherwise prohibited union shop agreements, such that the fees were effectively imposed by force of federal law. 351 U.S. at 232. This Court expressly held that the union shop "does not violate ... the First ... Amendment[]," *id.* at 238, and has described its holding as such ever since. *See Lehnert*, 500 U.S. at 515; *id.* at 552 (Scalia, J., concurring and dissenting); *Keller*, 496 U.S. at 7-9; *Abood*, 431 U.S. at 226 n.23. *Street*'s construction of the RLA was likewise premised on the Court's understanding that the First Amendment places limits on government-required fair-share fees, but allows them within those limits. *See* 367 U.S. at 746-50.

Abood held that the government could use the same system of exclusive collective bargaining representation to regulate its proprietary economic relationship with its own employees, because: (1) "the governmental interests advanced ... are much the same as those promoted by similar provisions in federal labor law," (2) "there can be no principled basis for according [the Michigan Legislature's] decision less weight ... than was given in *Hanson* to the congressional judgment," and (3) "a public employee" does not have "a weightier First Amendment interest than a private employee." 431 U.S. at 224, 229.

Petitioners criticize *Abood*'s reliance on *Hanson*, *see* Pet. Br. 21, in effect arguing that government employers have less ability to utilize collective

bargaining systems to structure their own proprietary labor relations than government regulators possess when structuring private-sector labor relations. But in holding that government employers could adapt the private-sector labor relations arrangements upheld in *Hanson* for public-sector personnel administration, *Abood* applied the well-established principle that governments have *greater* latitude in dealings with their own workforces than they do in regulating citizens, including with respect to First Amendment interests. *See Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 556, 564-67 (1973) (upholding broad restrictions on federal employees' political activities); *United Public Workers v. Mitchell*, 330 U.S. 75, 99-103 (1947) (same); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."); *see also Allen v. Wright*, 468 U.S. 737, 761 (1984) (recognizing "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'") (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

3. The Court has repeatedly considered and rejected all of the First Amendment arguments raised by petitioners.

Abood squarely rejected petitioners' contention that public-sector collective bargaining "is inherently 'political' and thus requires a different result under the First ... Amendment[]," concluding that, while there are "differences in the nature of collective bargaining in the public and private sectors," those differences "simply do not translate into differences in

First Amendment rights." 431 U.S. at 227, 232. Petitioners repeatedly cite Justice Powell's *Abood* concurrence (Pet Br. 21-23) in contending that *Abood* erred in reaching this conclusion, but they ignore that Justice Powell was concerned with instances where public-sector bargaining extended well beyond "narrowly defined economic issues." 431 U.S. at 263 n.16 (Powell, J., concurring). He accepted the validity of exclusive representation and fair-share fees in the context of collective bargaining over basic economic issues—which is all that is at issue here:

> I should think that on some narrowly defined economic issues—teachers' salaries and pension benefits, for example—the case for requiring the teachers to speak through a single representative would be quite strong, while the concomitant limitation of First Amendment rights would be relatively insignificant. On such issues the case for requiring all teachers to contribute to the clearly identified costs of collective bargaining also would be strong, while the interest of the minority teacher, who is benefited directly, in withholding support would be comparatively weak.

Id.

In *Minnesota State Bd. v. Knight*, 465 U.S. 271 (1984), this Court rejected petitioners' argument that the government violates public employees' First Amendment rights if it establishes a process for exclusive dealings in a private forum with an exclusive representative. As *Knight* recognized, petitioners "have no constitutional right to force [Illinois] to listen to their views. They have no such right as members of the public [or] as government employees ...." *Id.* at

283; *see Smith v. Ark. State Hwy. Emps.*, 441 U.S. 463, 465 (1979). *Knight* rejected petitioners' contention that an exclusive bargaining representative's meetings with the employer violate the "negative" associational rights of the bargaining unit members who do not support the union. *See* 465 U.S. at 288 ("The state has in no way restrained appellees' ... freedom to associate *or not to associate* with whom they please ....") (emphasis added). Even the dissenting justices in *Knight* considered it "*settled law* that a public employer may *negotiate* only with the elected representative of its employees." *Id.* at 315-16 (Stevens, J., dissenting) (emphases added). Indeed, the Court summarily affirmed the lower court's rejection of the *Knight* petitioners' "attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment." *Id.* at 278-79 (majority opinion).

Similarly, in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), the Court rejected the contention that a public employer engages in unconstitutional viewpoint discrimination by according the exclusive representative certain privileges (in that case, access to internal employee mailboxes) denied to rival organizations. The Court reasoned that the union, as the majority-designated representative, had "official responsibility" within the school's internal operations as "exclusive representative of *all* Perry Township teachers," justifying the differential treatment. *Id.* at 51 (emphasis in original).

Thus, this Court has repeatedly upheld public-sector exclusive representation systems. In doing so, the Court has not relied upon any contention that employees may be "assigned" a representative for

public "petitioning" activities, but has recognized that the First Amendment permits a public employer, in its personnel administration, to establish an official and limited internal process reserved for dealings with the organization designated by a majority of relevant employees.

4. In contending that this Court's longstanding precedents fail to acknowledge relevant First Amendment interests, petitioners ignore the significant limitations placed on systems of exclusive representation, which ensure they comport with First Amendment values.

First, the designation of an exclusive representative cannot limit an individual's right to engage in any expressive or associational activity. Public employees in a bargaining unit are not required to become union members, participate in union affairs, subject themselves to union rules, or "associate" with the union in any concrete way. Illinois' PLRA protects bargaining unit members against discrimination based on their decision regarding union membership. 5 ILCS 315/6(a), 315/10(a)(2). Members of a bargaining unit also are not required to "personally speak [any] message" or "host or accommodate [any] message," nor does the designation of an exclusive representative "suggest[] that [individual bargaining unit members] agree with any speech by [the representative]" or interfere with their ability to form their own expressive associations, nor are unit members "restrict[ed in] what [they] may say about the [union's] policies." *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 63, 65, 69 (2006). The designation of an exclusive bargaining representative also cannot prevent public employees from participating *as citizens* "in public discussion of

public business." *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976); *see Abood*, 431 U.S. at 230. "Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace." *Lehnert*, 500 U.S. at 521 (plurality opinion).

Second, the exclusive representative—when acting in that capacity—cannot freely pursue its own members' goals and interests at the expense of non-members within the bargaining unit. The representative has an "official responsibility" within the personnel administration system (*Perry*, 460 U.S. at 51) to serve the interests of the *entire* unit. *See, e.g.*, 5 ILCS 315/6(d) (duty of fair representation). An exclusive representative thus serves a public statutory function distinct from its role as advocate for its members. *See Lehnert*, 500 U.S. at 556 (Scalia, J., concurring and dissenting) ("[T]he state imposes upon the union a duty to deliver services .... In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members ....") (emphasis in original); *see also Steele*, 323 U.S. at 201-02. Far from "speak[ing] ... as the proxy" for non-members (or even for its own members), Pet. Br. 37, the representative has a statutory duty to represent the bargaining unit *as a whole*, so that the State can negotiate a single agreement governing the entire bargaining unit. *Cf. Huffman*, 345 U.S. at 338 ("A bargaining representative ... often is a labor organization but it is not essential that it be such. The employees represented often are members of the labor organization ... but it is not essential that they be such. The bargaining representative, whoever it may

be, is responsible to, and owes complete loyalty to, the interests of all whom it represents.").

Petitioners complain of the duty of fair representation, arguing that they are forced "into an involuntary fiduciary relationship with a union." Pet. Br. 30. But petitioners have no First Amendment right to negotiate their own employment contract, and a public employer's decision to choose what economic terms to offer, whether unilaterally for all employees or through negotiations with a majority-designated representative, does not interfere with employees' First Amendment rights. *See Knight*, 465 U.S. at 282-83, 286; *Smith*, 441 U.S. at 465. The duty of fair representation *protects* all bargaining unit members and ensures that the designated organization serves its statutory role. *Steele*, 323 U.S. at 201-02; *Huffman*, 345 U.S. at 337. The duty is no more a burden on benefitted employees than the fiduciary duty owed by outside pension fund managers to the beneficiaries of pension accounts, which may be similarly "imposed" on public employees through government-mandated benefit plans.

Finally, when engaged in negotiations, the exclusive representative may not engage in unfettered speech or "petitioning" activities. Rather, it has a good faith bargaining duty, which requires that it bargain about those subjects that the government has opened for negotiation and refrain from insisting on positions or concessions outside such mandatory subjects. *See* 5 ILCS 315/7, 315/10(b)(4); *cf.* 29 U.S.C. §158(b)(3), (d).

In short, public-sector collective bargaining is not a system through which a union freely engages in "petitioning" on behalf of unwilling citizens. Rather, it is a non-public, specialized, and regulated process designed by the government employer as part of its

internal system of personnel administration, within which the exclusive representative plays an official and assigned role.

B. Fair-Share Fees Are Consistent With The First Amendment

As with exclusive representation, this Court has repeatedly rejected petitioners' arguments regarding fair-share fees. Decades of settled First Amendment precedents on this issue are part of a more general line of decisions that apply to, among other things, mandatory bar association dues. This Court has considered the First Amendment issues and held that fair-share fees may be assessed to support the collective bargaining representative's or bar association's "core" legally-prescribed functions. The Court has also adopted substantive and procedural limitations to ensure that such fees remain so confined, and otherwise fully comport with the First Amendment.

1. The Court's relevant jurisprudence, beginning with *Hanson* and running through *Keller*, *Glickman*, and *United Foods,* stands for the settled proposition that, when the government creates a valid cooperative association for economic, commercial, or other predominantly non-speech purposes, the government may fund that association's core activities through compulsory payments by those within the relevant group. Such payments are justified by the government's "overriding associational purpose," and to the extent this entails subsidizing some expressive activity, those payments are "a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity." *United Foods*, 533 U.S. at 413-14.

Thus, *Hanson* held that a government-imposed "requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work ... does not violate ... the First ... Amendment[]." 351 U.S. at 238. The Court reaffirmed that holding in *Street* by distinguishing between fees to pay for contract negotiation and administration and fees to support "political activities." 367 U.S. at 779-70. The Court likewise relied on *Hanson* to hold that the government may require attorneys to join and pay dues to a bar association. *See Lathrop v. Donohue*, 367 U.S. 820, 842-43 (1961) (plurality opinion); *id.* at 849 (Harlan, J., concurring).

Abood followed those settled precedents, holding that the government can require its own employees to bear their proportionate share of the costs of negotiating and administering a contract establishing their bargaining unit's employment terms. 431 U.S. at 232. The Court acknowledged that a requirement "financially to support their collective-bargaining representative has an impact upon their First Amendment interests," but concluded that "the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations." *Id.* at 222.

The same general principle applies to state-mandated, integrated bar associations. "Lawyers [can] be required to pay moneys in support of activities that [are] germane to the reason justifying the compelled association in the first place, for example, expenditures ... that relate[] to 'activities connected with disciplining members of the Bar or proposing ethical codes for the profession.'" *United Foods*, 533

U.S. at 414 (quoting *Keller*, 496 U.S. at 16); *see Lathrop*, 367 U.S. at 842-43. That requirement is consistent with the First Amendment, even if some dues pay for expressive activities germane to the bar's core mission, because "[t]hose who [are] required to pay a subsidy for the speech of the association already [are] required to associate for other purposes, making the compelled contribution of moneys to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity." *United Foods*, 533 U.S. at 414; *see also Keller*, 496 U.S. at 12-14.[6] The same principle allows the government to require agricultural growers to pay fair-share fees to an agricultural cooperative, where "mandated cooperation was judged by Congress to be necessary to maintain a stable market" and "marketing orders ... to a large extent deprive[] producers of their ability to compete and replace[] competition with a regime of cooperation." *United Foods*, 533 U.S. at 414 (discussing *Glickman*).

Conversely, this Court held in *United Foods* that compelled subsidies for advertising violate the First Amendment when that First Amendment expressive activity stands alone and is not a "concomitant of a valid scheme of economic regulation." *Id.* at 412. But no Justice questioned the government's ability to require compulsory payments for "core" activities that,

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[6] This Court has repeatedly recognized *Abood* and *Keller* as companion cases establishing a single First Amendment principle. *See United Foods*, 533 U.S. at 413, 415; *Johanns v. Livestock Mkt'g Ass'n*, 544 U.S. 550, 557-58 (2005); *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 230-31 (2000); *Glickman*, 521 U.S. at 473. By asking this Court to overrule *Abood*, petitioners necessarily ask this Court to overrule *Keller*.

"as in *Abood* and *Keller*, [are] in furtherance of an otherwise legitimate program." *Id.* at 415.

Petitioners get matters entirely wrong in analogizing fair-share fees that fund core collective bargaining activities to the mandatory advertising payments struck down in *United Foods*. "Collective bargaining, and related activities such as grievance arbitration and contract administration, are part and parcel of ... economic transactions between employees and employer ...." *Glickman*, 521 U.S. at 484 (Souter, J., dissenting). Like other transactions in which the government procures goods or services, these transactions occur in structured, proprietary, and non-public settings, such as closed bargaining sessions and arbitrations. In the context of such economic transactions, any compelled association predominantly involves *commercial* association for the non-speech purpose of arriving at a mutually satisfactory and binding agreement, and the State, as proprietor, may structure its process for contracting with employees and contractors through reasonable regulations, including by compelling payments to fund the required association's core activities. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 638 (1984) (O'Connor, J., concurring) ("[*Abood*] ruled that a State may compel association for the commercial purposes of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances, but it may not infringe on associational rights involving ideological or political associations.").[7]

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[7] *See also Glickman*, 521 U.S. at 485 (Souter, J., dissenting) ("[I]n contrast to [the] right of expressive association, 'there is only minimal constitutional protection of the freedom of *commercial* association,' because 'the State is free to impose any rational regulation on the commercial transaction itself[.]'") (quoting

2. Petitioners also ignore this Court's extensive body of law crafting significant fair-share fee limitations to protect First Amendment interests. Beginning with *Street* and continuing in *Abood*, *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Lehnert*, and *Locke*, "the Court has considered the constitutionality of charging for various elements of such a fee, upholding the charging of some elements (*e.g.*, those related to administering a collective-bargaining contract) while forbidding the charging of other elements (*e.g.*, those related to political expenditures)." *Locke*, 555 U.S. at 210. These decisions place significant limitations on the activities for which fair-share fees may be charged, but reject petitioners' contention that *any* collection of fair-share fees violates the First Amendment. *See, e.g.*, *id.* at 218; *Lehnert*, 500 U.S. at 524. The Court's cases also impose procedural limits on fair-share fees collection to protect First Amendment rights. *See, e.g.*, *Teachers v. Hudson*, 475 U.S. 292, 310 (1986); *Knox*, 132 S.Ct. at 2296. Petitioners allege no violation of any of these protections.

Roberts, 468 U.S. at 634 (O'Connor, J., concurring)) (emphasis in original); *cf. Borough of Duryea v. Guarnieri*, 131 S.Ct. 2488, 2496-97 (2011) (to the extent that public employees' contractual grievances might be characterized as "petitioning," employees' First Amendment interests may have to yield to government's proprietary interests in efficiently operating its internal personnel administration system); *id.* at 2506 (Scalia, J., concurring and dissenting) (demands "addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign" are not First Amendment "petitions").

C. *Abood* Is Consistent With Other First Amendment Precedents

This Court has consistently deferred to legislative judgments regarding both the importance of the government interests served by systems of compelled commercial association and fair-share fees, and the manner in which such systems serve those interests. *See Hanson*, 351 U.S. at 234 ("The decision [whether to permit union shop agreements] rests with the policy makers, not with the judiciary."); *Abood*, 431 U.S. at 222-25 (deferring to "the *legislative assessment* of the important contribution of the union shop to the system of labor relations") (emphasis added); *Hudson*, 475 U.S. at 301 n.8 ("accord[ing] great weight to the congressional judgment" that permitting fair-share fees "would promote peaceful labor relations"); *Lathrop*, 367 U.S. at 843 ("State Bar activities serve the function, *or at least so Wisconsin might reasonably believe*, of elevating the educational and ethical standards of the Bar ....") (emphasis added); *Keller*, 496 U.S. at 12-13 (declining to weigh relative interests in agency shop and integrated bar).

Petitioners ask this Court to disregard these precedents because they did not apply strict scrutiny. *See, e.g.*, Pet. Br. 18. But they are entirely consistent with settled First Amendment principles. Strict scrutiny does *not* apply to the regulation of commercial or economic association, including labor regulation. *See, e.g.*, *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945) (in role as representative of "general *business* needs of employees," regulation of union's "right of selection to membership" is constitutionally permissible) (emphasis added). And of particular relevance to public-sector collective bargaining, strict scrutiny does *not* apply to the government's actions as

proprietor (not sovereign) in dealing with employees and contractors. *See, e.g.*, *Guarnieri*, 131 S.Ct. at 2500; *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 675-76 (1996); *Letter Carriers*, 413 U.S. at 556, 564-67; *Mitchell*, 330 U.S. at 99-103.

1. *Abood* applied the correct analysis

a. In *Abood*, *Keller*, and the other decisions cited above, the Court properly deferred to legislative judgments because of the predominantly economic and commercial nature of the compelled "association" at issue. The government possesses broad authority to regulate association for *economic* or *commercial* purposes—even when that regulation has some impact on First Amendment interests. *See Roberts*, 468 U.S. at 634 (O'Connor, J., concurring) ("[T]here is only minimal constitutional protection of the freedom of *commercial* association.") (emphasis in original); *see also NAACP v. Claiborne Hardware*, 458 U.S. 886, 912 (1982); *Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 461 (7th Cir. 1972) (Stevens, J.) ("[T]he economic activities of a group of persons (whether representing labor or management) who associate together to achieve a common purpose are not protected by the First Amendment."). The government may, for example, prohibit horizontal boycotts by competitors, including economic boycotts of the government to induce government action, even though such prohibitions also limit First Amendment speech and associational rights. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428, 431 (1990).

Petitioners rely entirely on the erroneous premise that a system of exclusive collective bargaining representation must be understood as "compel[led] association for the inherently expressive purpose of

petitioning the government." Pet. Br. 23. To the contrary, in creating a collective bargaining system, a state employer creates an *economic* and *commercial* association, based on pre-existing employment relationships, in order to better negotiate and enforce a single binding contract establishing terms and conditions for its workforce's employment. *Cf. United Foods*, 533 U.S. at 414 ("To attain the desired benefit of collective bargaining, union members and nonmembers [are] required to associate with one another, and the legitimate purposes of the group [are] furthered by the mandated association."). The negotiation of that contract occurs through a regulated and specialized process that is not required by the First Amendment, *Smith,* 441 U.S. at 465, and from which the government may exclude individuals at its discretion. *Knight*, 465 U.S. at 273; *see Perry*, 460 U.S. at 48-49. The government's decision to establish a bargaining unit and to require its employees to pay for contract negotiation and administration on the unit's behalf involves not "compelled petitioning" but regulation of the government's internal economic affairs as an employer, and such decisions "rest[] with [personnel] policy makers, not with the judiciary." *Hanson*, 351 U.S. at 234; *cf. Abood*, 431 U.S. at 229 (finding "no principled basis" for according State's decision "less weight in the constitutional balance" than *Hanson* gave to the "congressional judgment" reflected in the RLA).

Indeed, the significant government-imposed limitations on exclusive representatives are entirely inconsistent with petitioners' theory that they are compelled to support an association predominantly engaged in First Amendment expression. Exclusive representatives must by law represent the unit, not their own members' interests. *See supra* at 24-25.

They must bargain in good faith about only those subjects that the government has opened for negotiation. *See* 5 ILCS 315/7, 315/10(b)(4); *cf.* 29 U.S.C. §158(b)(3), (d). And the government extensively regulates labor unions' internal activities, including the manner in which they may define membership, elect leadership, conduct meetings, and set dues. *See, e.g.*, 29 U.S.C. §401 *et seq*. All these regulations could not survive constitutional scrutiny if collective bargaining constituted "inherently expressive" association. *See, e.g.*, *Claiborne Hardware*, 458 U.S. at 914. Such regulation is permissible, however, when *economic* association is at issue. *See, e.g.*, *Int'l Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212, 226-27 (1982) (rejecting First Amendment challenge to NLRA's secondary picketing prohibitions); *NLRB v. Retail Store Emps.*, 447 U.S. 607, 616-19 (1980); *Roberts*, 468 U.S. at 637-38 (O'Connor, J., concurring).

Thus, far from disregarding this Court's precedents, the distinctions drawn in *Abood*—between the core collective bargaining activities that employees may be compelled to fund; germane activities not involving political or ideological expression, which may also be so funded; and "non-chargeable" activities, which can be funded only through voluntary contributions, *see Lehnert*, 500 U.S. at 517-19—track the well-established distinctions between a union's *commercial* activities as exclusive representative, which are subject to reasonable regulation; expressive activities incident to its commercial activities, which must be regulated with greater precision; and its political and ideological activities, which receive full First Amendment protection. *See Roberts*, 468 U.S. at 638 (O'Connor, J., concurring) ("[A] State may compel association for the commercial purposes of engaging in collective bargaining, administering labor contracts,

and adjusting employment-related grievances, but it may not infringe on associational rights involving ideological or political associations."); *see also Retail Store Emps.*, 447 U.S. at 616; *Citizens United v. FEC*, 558 U.S. 310, 318-19 (2010).

b. Petitioners' theory ultimately rests on challenging *Abood*'s deference to the state legislature's decision to adopt for its own workforce the private-sector fair-share arrangements approved in *Hanson*. In the public sector, petitioners argue, such arrangements must satisfy strict scrutiny, which was purportedly unnecessary in *Hanson*'s purely regulatory context. Pet. Br. 18, 21-22. But petitioners' challenge turns upside down this Court's long-standing view that "the government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion of O'Connor, J.); *see Letter Carriers*, 413 U.S. at 556, 564-67 (upholding broad restrictions on public employee political activity); *Mitchell*, 330 U.S. at 99-103 (same); *Pickering*, 391 U.S. at 568 (public employer cases require special deference to government's interests "as an employer, in promoting the efficiency of the public services it performs through its employees"); *cf. Engquist v. Or. Dep't of Ag.*, 553 U.S. 591, 598 (2008) ("[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'") (quoting *McElroy*, 367 U.S. at 896).

Given the importance of the government's interests in being an effective economic actor and structuring its internal proprietary affairs, where a public employer

regulates its employees' personal speech on matters of public concern, the Court balances the "'interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Letter Carriers*, 413 U.S. at 564 (quoting *Pickering*, 391 U.S. at 568). The balance is conducted with significant deference to the government's legitimate workforce management interests, and has resulted in this Court upholding far greater and more direct impingements on speech interests than are even arguably presented here. *See, e.g.*, *id.* at 567 (upholding broad ban on partisan activities and associations); *Mitchell*, 330 U.S. at 99-103 (same). The same deferential balancing test applies to government workforce management choices whether the affected party is an employee or a contractor, *Umbehr*, 518 U.S. at 677-78; *cf. NASA v. Nelson*, 131 S.Ct. 746, 758-59 (2011), and to the impact of such choices on both speech and petition rights. *See Guarnieri*, 131 S.Ct. at 2495, 2497.[8]

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[8] Rather than acknowledge the deference accorded government proprietors in structuring their internal economic affairs or the distinction between compelled association in the economic sphere and compelled association relating to predominantly expressive activities, petitioners attack all uses of exclusive representation in public-sector collective bargaining as unconstitutional on the theory that such bargaining implicates "public concerns." But acceptance of petitioners' theory would also cast into doubt the constitutionality of exclusive representation in the *private* sector. Private-sector labor relations rest on the foundation of exclusive representation compelled by law, from the NLRA and RLA to various state agricultural labor relations acts. Private-sector economic bargaining in industries like defense, auto, steel, transportation, energy, health care, and privatized public services quite often implicates "public concerns." *See, e.g.*,

By ignoring the deference that this Court shows in public workforce management cases, petitioners would have this Court evaluate public-sector exclusive representation and fair-share fees in a manner wholly inconsistent with the larger body of relevant First Amendment law.[9]

c. This Court's First Amendment decisions do not support petitioners' invocation of strict scrutiny. Their argument instead rests entirely upon language in *Knox*, but *Knox* did not involve "core" collective bargaining activities. *Knox* instead involved a public-sector union's use of fair-share fees to fund its political activities outside of collective bargaining—a "special

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Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 582-83 (1952). *Abood* properly recognized that the First Amendment interests of dissenting public employees are not constitutionally greater than the interests that might be asserted in private-sector contexts. *See* 431 U.S. at 231.

[9] The *only* context in which this Court has suggested strict scrutiny *might* apply to decisions by a public employer implicating its employees' First Amendment rights is the political patronage context. *See Elrod v. Burns*, 427 U.S. 347, 363 (1976) (plurality opinion of Brennan, J.). The "patronage" decisions are inapposite because, unlike fair-share fees funding "core" collective bargaining activities, political patronage involves political behavior unrelated to workforce management interests. *See id.* at 366; *cf. O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 714 (1996) (public employee may be discharged on political grounds if "political affiliation is a reasonably appropriate requirement for the job in question"); *Lehnert*, 500 U.S. at 517 (consistent with *Elrod*, *Abood* prohibits compelled support for ideological activities outside collective bargaining context); *Abood*, 431 U.S at 233-36 (citing *Elrod* in discussing union ideological activities). This Court has never extended *Elrod* beyond pure political patronage. *See O'Hare*, 518 U.S. at 719 (*Elrod* rule applies "where political affiliation alone" is basis for employer's decision).

assessment billed for use in electoral campaigns" of which "nonmembers ... were nevertheless required to pay more than half." 132 S.Ct. at 2291. In that campaign, the union did not act within the scope of its statutory role as exclusive representative, but solely as a First Amendment expressive political association. Compelling workers to pay fees for that purpose involved mandatory association for expressive political purposes, and *Knox*'s language reflects that different context.

2. *Abood* reached the correct conclusion as to both exclusive representation and fair-share fees

In addition to applying the right analysis, *Abood* also reached the correct conclusion that, within the limits the Court has established, the important government interests served by exclusive representation and fair-share fees justify their limited impact on First Amendment rights.

a. As explained above, exclusive collective bargaining representation serves important government interests by promoting stabilized labor relations. *See supra* at 16-18. Moreover, the *negotiation* and *enforcement* of public employees' terms and conditions of employment by a union is primarily an *economic* interaction fully subject to regulation. *See supra* at 29, 32-35. The role of the exclusive representative within that context is not that of a private entity exercising unfettered expression rights, but a regulated entity exercising "official responsibilit[ies]" imposed by law. *Perry*, 460 U.S. at 51. Adoption of the requirement that negotiations and contract enforcement within the officially established channels be conducted by the entity designated by a majority of the workforce (if any) is thus within the discretion of an economic

policymaker (and well within the discretion of a public personnel policymaker).

Accordingly, *Abood* correctly concluded that a public employer can require employee cooperation to achieve its workforce management goals and pursue its significant interests in improving effectiveness, efficiency, and morale, including by creating formal cooperative structures to involve employees in resolving workforce issues. *See Guarnieri*, 131 S.Ct. at 2495-97 (acknowledging "substantial government interests" in "efficient and effective operation," employee "morale," and management of internal affairs through specialized employee dispute resolution systems).

b. *Abood* was also correct in recognizing the significant government interests served by fair-share fees within an exclusive representation system and their limited impact on employees' First Amendment interests.

Fair-share fees prevent unfairness to union members, incentives to "free ride" on member-employees' efforts, and resulting conflicts. Without them, dues-paying members bear the burden of paying for *all* costs of representing the unit, subsidizing the services provided to non-members. *See, e.g.*, *Street*, 367 U.S. at 760-64. Fair-share payments thus prevent members' voluntary contributions from being "depleted to cover the costs incurred in the representation of [those] free riders." *Robinson v. New Jersey*, 741 F.2d 598, 610 (3d Cir. 1984) (Adams, J.); *cf. Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980) ("common-fund" attorneys' fees awards "rest[] on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense").

Exclusive representation presents a classic "free rider" situation because the "public good" of representation will not be adequately funded absent compulsory fees, even if all members of the unit view a fully funded representative as in their interest. *See* Mancur Olson, Jr., *The Logic of Collective Action* 11, 14-16, 67, 75-76, 85-87 (1965) (discussing collective action problems unions face without fair-share fees, including that even union supporters then have rational economic incentives to avoid paying because they can receive the same benefits for nothing, know that their payments will be used to benefit non-payers, and risk bearing an increasingly disproportionate share of overall costs); Eric A. Posner, *The Regulation of Groups*, 63 U. Chi. L. Rev. 133, 137-38 (1996) (in such a system, "each [individual] actor finds it rational to cheat"); *cf. Consolidated Edison v. Bodman*, 445 F.3d 438, 442-43 (D.C. Cir. 2006) (Williams, J.) (comparable problems justify "common fund" attorneys' fees awards).

Moreover, the government interest here is far greater than in most "free rider" situations because fair-share fees in this context overcome obstacles to beneficial cooperative action *that the government itself creates*. Exclusive collective bargaining representation imposes an obligation on the union and its members to produce "public goods" whose benefits *by law* must be provided to all bargaining unit members. As Justice Scalia explained in *Lehnert*:

> In the context of bargaining, a union *must* seek to further the interests of its non-members; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership

> (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.

500 U.S. at 556 (Scalia, J., concurring and dissenting) (emphasis in original). Thus, the role played by the statutory duty of fair representation, including its impact on the activities of the union and its members, distinguishes this situation from that of a purely private activity that merely happens to further the interests of others:

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost .... [T]he "free riders" who are nonunion members of the union's own bargaining unit ... are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests.

Id. (Scalia, J.) (emphases in original). The State has a significant interest in correcting the resulting state-created collective action problem and establishing conditions likely to generate an optimal amount of the "public good" benefits of exclusive representation, so that the system is not seriously weakened by lack of participation. *See* James D. Gwartney et al., *Economics: Private and Public Choice* 102 (14th ed. 2013) (free riders lead to inefficient "undersupply [of] public goods, even when the [group] in aggregate values them highly relative to their cost").

Accordingly, even if a desire to prevent "free riding" is not normally sufficient to justify compulsory payments to a group like the PTA, *cf. Knox*, 132 S.Ct. at 2289, fair-share fees in this context reflect the exclusive representative's legally-mandated, official role within a government-established system. They also reflect the State's significant interest in supporting its exclusive representation system by ensuring an adequately funded representative that can represent the unit in a manner that promotes an effective and credible system, e.g., by hiring staff, drawing on expertise, and creating arrangements to involve the unit in formulating its goals. By spreading the costs of representation among all workers in the bargaining unit, the government also provides an incentive for all bargaining unit workers to hold their representative accountable to the entire unit.

This Court's decisions from *Hanson* through *United Foods* have recognized that, once the government has adopted a valid economic system of required cooperation, the significant government interests that justify that cooperative system also justify the use of fair-share fees. All bargaining unit members potentially benefit from the union's actions as exclusive representative. *See United Foods*, 533 U.S. at 414-15 (fair-share fees upheld in *Abood*, *Keller*, and *Glickman* funded mandatory associations generating benefits for all members).[10] To the extent fair-share

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[10] Indeed, in the public employer context, this Court has upheld far greater impingements on employees' First Amendment interests than are at issue here because they provided countervailing overall benefits to employees. *Compare Letter Carriers*, 413 U.S. at 566-67 (upholding prohibition on employees' partisan political activity that protected public employees from political coercion), *with United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 471, 477 (1995) (distinguishing *Letter*

fees for costs germane to collective bargaining representation may implicate First Amendment interests, the "compelled contribution of moneys" is "a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity," *id.* at 414, and its impact on First Amendment interests is not greater than the impact inherent in the system of exclusive representation itself. The *form* of that impact may differ, but the First Amendment interest in both is the identical desire to distance oneself from the union's activities as bargaining agent. *See Abood*, 431 U.S. at 222, 235.

In sum, the legal principles in *Abood* were not novel, were correct, and have not since been undermined.[11]

D. *Stare Decisis* Precludes Overruling *Abood*

Even if this Court would not reach the same conclusion today that it did in *Abood*, departure from precedent "always require[s] ... 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citation omitted). Reluctance to overturn precedent should be especially strong where, as here, a "long and unbroken series of precedents reaffirm[] th[e] [settled] principle." *Welch v. Tex. Dep't of Hwys. & Pub.*

Carriers on that basis and invalidating broad prohibition on compensation for speech activities unrelated to employment).

[11] Although this Court's decisions provide no basis for applying strict scrutiny to public-sector exclusive representation or fair-share fees, both would survive such scrutiny because they are necessary to the compelling government interests discussed above. Indeed, in his *Abood* concurrence, Justice Powell concluded that, as to core bargaining over economic terms, the system would survive strict scrutiny. 431 U.S. at 255, 263-64 & n.16 (Powell, J. concurring).

Transp., 483 U.S. 468, 494 (1987) (plurality opinion of Powell, J.). A decision overruling *Abood* would effectively overrule *Keller* and call into question numerous other precedents, as well as the logic underlying important aspects of the NLRA and the RLA. *See Locke*, 555 U.S. at 210; *United Foods*, 535 U.S. at 413-15; *Glickman*, 521 U.S. at 472-74; *Lehnert*, 500 U.S. at 516-19; *Keller*, 496 U.S. at 12-17; *Hudson*, 475 U.S. at 294, 301-02; *Ellis*, 466 U.S. at 447-48, 455-57; *see also Knight*, 465 U.S. at 279; *Perry*, 460 U.S. at 50-53; *CWA v. Beck*, 487 U.S. 735, 762-63 (1988).

The burden of justifying a departure from precedent is higher still where, as here, there has been substantial institutional reliance on well-settled law. State and local governments have for decades structured their basic public employment systems around exclusive representation supported by fair-share fees, and countless workers have made career choices based on the vitality of those systems and the validity of the resulting contracts. *See Quill Corp. v. North Dakota By & Through Heitkamp*, 504 U.S. 298, 320 (1992) (Scalia, J, concurring) ("demands" of *stare decisis* are "at their acme ... where reliance interests are involved").

Petitioners do not even attempt to meet their high burden. Petitioners suggest *no special justifications* for overruling *Abood* and the long line of cases that have followed it, and no such justifications exist.

II. THE REQUIREMENT THAT ALL PERSONAL ASSISTANTS BEAR THEIR FAIR SHARE OF COLLECTIVE BARGAINING COSTS IS CONSISTENT WITH THE FIRST AMENDMENT

Abood and *Hanson* are good law, should not be overruled, and directly control the outcome here. The Rehabilitation petitioners do not contend Illinois' PLRA differs in any relevant respect from the statutes in those cases. Nor do petitioners contend that the regulatory regime here has any greater impact on their First Amendment interests. Rather, petitioners argue that the State is not their "employer," and therefore has no interest in stabilized labor-management relations to be served by exclusive representation. Pet. 24-26, 39-49. They are wrong as to the first point, as the court below held. But even if the State is not a "joint employer," its interest in promoting productive collective bargaining to stabilize and develop this State program's workforce wholly legitimates the exclusive representation and fair-share fee arrangement here.

A. *Abood* Controls This Case

1. The State retains authority to set employment terms for its personal assistant workforce

Illinois pays personal assistants an hourly wage to provide care to "customers." Given the intimate nature of those services, the Legislature delegated to customers the limited authority to select and supervise their personal assistants (within the Program's rules). But the Legislature *retained* for the State all traditional "employer" authority to set the economic terms of employment, to approve service

plans detailing the tasks personal assistants can perform and the time permitted for each task, and to exercise all other "employer" authority not expressly delegated to customers. The State and the customers are therefore joint employers.

a. The joint employment doctrine, pursuant to which two entities that "exercise[] common control" over a group of employees are deemed joint employers, is well-established for labor relations purposes. *Boire v. Greyhound Corp.*, 376 U.S. 473, 475-76 (1964).[12]

Here, the State's retention of substantial employer authority establishes it as the personal assistants' "joint employer." The State pays the personal assistants' wages, and State officials have sole authority to establish the wage rate and all other compensation terms. The State processes personal assistants' time sheets, pays personal assistants directly, deducts income taxes, and pays for health benefits. State officials exercise control over the work itself by approving service plans establishing the specific tasks to be performed and the amount of time allotted thereto. The State provides protective gloves to personal assistants when necessary for their work, and pays for and is jointly developing a mandatory personal assistant training program. The State requires personal assistants to attend an orientation paid for by the State. Although the State permits customers to select their personal assistants, the State restricts that choice and participates in the process by

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[12] The concept of joint employment is also recognized under the common law, *Vizcaino v. U.S. Dist. Court*, 173 F.3d 713, 723-24 (9th Cir. 1999), and other labor statutes, *Antenor v. D & S Farms*, 88 F.3d 925, 929-30, 932 (11th Cir. 1996); *see* Restatement (Third) of Employment Law §1.04 & cmt. c (Tent. Draft No. 2 (revised) 2009).

setting minimum qualifications, conducting criminal background checks, and requiring that a State official confirm that any prospective personal assistant can communicate and follow directions adequately. State officials attend required annual evaluations of personal assistants. The State requires the customer and personal assistant to sign an employment agreement created by the State. The State can effectively fire personal assistants by disqualifying them from the Program.

Given these factors, the providers here qualify as public "employees" under many statutes' tests of employee status. Prior to the amendment of the PLRA, for example, the Illinois Workers' Compensation Commission consistently concluded that Rehabilitation personal assistants are State "employees" for workers' compensation purposes. *See, e.g.*, *Martin v. State of Ill., Dep't of Human Servs.*, 04 IL.W.C. 31542 (Ill.W.C.C), 2005 WL 2267733, at *5-7 (Jul. 26, 2005); *see also* D.Ct. Doc. 32-9. Courts in other jurisdictions have ruled that the government is an "employer" of workers similarly situated to the personal assistants here despite the authority delegated to the service recipient. *See, e.g.*, *Bonnette v. Cal. Health & Welf. Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983); *Rivera v. Puerto Rican Home Attendants Servs.*, 922 F. Supp. 943, 949-50 (S.D.N.Y. 1996); *In-Home Supportive Servs. v. Workers' Compensation Appeals Bd.*, 152 Cal.App.3d 720, 729-33 (1984).

The Seventh Circuit therefore correctly concluded that personal assistants have an employment relationship with the State beyond the Legislature's decision to classify them as "public employees" in the PLRA. *See* J.A. 9a-11a.

b. *Abood* recognized that the First Amendment generally permits the government to regulate its economic relationship with a workforce through labor relations structures comparable to those used in the private sector, because the relevant interests are substantially similar. 431 U.S. at 232. Illinois' decision to use the PLRA to structure its proprietary relationship with the personal assistant workforce in this joint employer situation has a similarly sound basis in analogous private-sector labor experience.

The National Labor Relations Board (NLRB) will recognize an exclusive collective bargaining representative in the private sector, even if the employer does not control the entire range of employment conditions. *Management Training Corp.*, 317 NLRB 1355, 1357-58 (1995). In an analogous situation, an employment agency was deemed an NLRA employer even though it referred workers to clients who could request or refuse referrals and exercised "exclusive control over [employees'] day-to-day activities." *NLRB v. Western Temp. Servs.*, 821 F.2d 1258, 1266 (7th Cir. 1987). And the NLRA covers homecare workers employed by private agencies to serve individual clients, even though the agencies do not directly supervise workers at the worksite. *See, e.g., Human Dev. Ass'n*, 293 NLRB 1228, 1228, 1231-32, 1242 (1989).

This Court has also confirmed the propriety of collective bargaining in such circumstances. *NLRB v. E.C. Atkins*, 331 U.S. 398, 405, 407-13 (1947), upheld the NLRB's determination that a corporation's control over terms and conditions of employment such as wages and hours established its "employer" status under the NLRA, notwithstanding the Army's ultimate control over the employees' hiring, firing, and

physical activities. The Court reasoned that, in determining whether "the conditions of the relation are such that the process of collective bargaining may appropriately be utilized," the necessary "relationship may spring as readily from the *power to determine the wages and hours of another*, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker." *Id.* at 413-14 (emphasis added).

Here, Illinois has sole control over *all* economic terms of the personal assistants' employment, and therefore can and does engage in meaningful collective bargaining to negotiate a contract establishing those terms. Its decision to do so reflects sound labor policy.

2. The system of exclusive representation stabilizes the State's labor relations with this workforce

The State's use of a system of exclusive representation here reflects the same policy judgment that has made exclusive representation systems virtually universal for regulating collective bargaining in the United States: The system best promotes "industrial peace and stabilized labor-management relations," with all the resulting benefits. *Hanson*, 351 U.S. at 234; *see Abood*, 431 U.S. at 220-21; *supra* at 16-18.[13]

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[13] The State's interest in this system of exclusive bargaining representation was never limited to an interest in "feedback." Pet. Br. 42-44. The Legislature amended its PLRA to include personal assistants, and the PLRA declares that its broad purposes include "protect[ing] the public health and safety of the citizens of Illinois, and ... provid[ing] peaceful and orderly procedures for the protection of the rights of all." 5 ILCS 315/2. The Executive

a. Petitioners contend that Illinois cannot have a legitimate interest in harmonious labor relations with this workforce because it gives customers the authority to select and supervise their own personal assistants within the Program's rules. That it is plainly incorrect.

First, the State depends on this workforce of more than 20,000 personal assistants to carry out its Rehabilitation Program. Any labor disruption, poor morale, high turnover, or workforce shortages would be of serious concern to the State. Such concerns are not theoretical. Rehabilitation Program personal assistants organized and demanded recognition before the Legislature brought them within the PLRA. Like other workers, homecare workers have gone on strike. *See NLRB v. Special Touch Home Care Servs.*, 708 F.3d 447, 449-50 (2d. Cir. 2013). And homecare workers can support rival unions who might then make competing and destabilizing demands on an employer. Indeed, two rival labor organizations competed to represent the personal assistants in a different State program, albeit unsuccessfully. Pet. App. 5a. The PLRA addresses these threats to workforce stability by enabling the State to negotiate a single contract with the representative chosen by the majority, if one is chosen, who is made responsible for serving the entire unit's interests.

Order cited by petitioners emphasizes that applying that system to personal assistants is "important to ... preserve the State's ability to ensure efficient and effective delivery of personal care services" because "each recipient employs only one or two personal assistants and does not control the economic terms of their employment ... and therefore cannot effectively address concerns common to all personal assistants." Pet. App. 45a-46a.

Second, workforce shortages, excessive turnover, and lack of training present enormous problems for states seeking to provide home-based care, and the demand for homecare workers is increasing as the population ages. Individual customers do not have the authority, interest, capacity, or incentive to address issues that affect the personal assistant workforce *as a whole*. Addressing such workforce-wide issues, however, is critical to ensuring that eligible individuals can find a personal assistant and obtain quality care, and thereby avoid the greater expense to the State of institutionalization. Illinois reasonably concluded that this system of exclusive collective bargaining representation would allow the State to address such systematic concerns and maximize worker satisfaction in a cost-effective way. A contract with the personal assistants' own representative, chosen by the majority and having a duty to fairly represent all providers, is likely to have value and legitimacy to the workforce. The reasonableness of that judgment is confirmed by the existence of similar systems in other states.[14]

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[14] Although each has its differences, at least nine other states have systems for delivering home care that divide employer authority between the government and customers, and that statutorily designate a public entity as the providers' "employer" for purposes of collective bargaining about matters within the government's control, should the providers so choose. *See* Cal. Gov't Code §110000 *et seq.*; Cal. Welf. & Inst. Code §§12300.7, 12301.6(c), 12302.25(a); Conn. Gen. Stat. §§17b-706, 17b-706a(e), 17b-706b; Md. Code, Health-Gen. §15-901 *et seq.*; Mass. Gen. Laws ch. 118E, §73; Minn. Stat. Ann. §§179A.54, 256B.0711; Mo. Rev. Stat. §208.862; Or. Const., art. XV, §11(3)(f); Or. Rev. Stat. §§410.608-410.614; Vt. Stat. Ann. Tit. 21, §1634; Rev. Code Wash. §74.39A.270.

Third, that the terms about which executive branch officials can bargain are to some extent limited by the authority delegated to individual customers does not undermine the State's interests. That delegation reflects the State's policy to promote customer independence, not its lack of interest in workforce issues. Indeed, many public-sector bargaining relationships are subject to comparable limitations on bargaining, such as limits on bargaining over job security issues because of civil service laws or (in the educational sector) limits on bargaining over class size and school year length. The existence of such "statutory restrictions" on public-sector bargaining did not alter the holding in *Abood*. *See* 431 U.S. at 228. If anything, by limiting collective bargaining solely to economic terms of employment, Illinois *reduces* the risk that bargaining will involve matters with more profound ideological significance. *See, e.g.*, *id.* at 263 n.16 (Powell, J., concurring) (distinguishing bargaining over wages and benefits from policy issues such as "how best to educate the young").[15]

Fourth, the fact that personal assistants work at separate sites does not change the State's interest in establishing employment terms common to all. Many public- and private-sector workers employed across scattered locations, from repairmen to visiting nurses, bargain through systems of exclusive representation.

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[15] Petitioners contend that the exclusive representative "petition[s] the State over its Medicaid rates and policies," including "policies governing the distribution of public benefits through Medicaid-funded programs," Pet. Br. 3-4, but there is nothing in the relevant CBAs that addresses eligibility for Program benefits or the scope of Program services. Rather, such issues are outside the scope of bargaining. *See* CBA, Art. V; J.A. 41-42.

There also are a variety of collective bargaining structures in the private sector in which an employer association bargains a "master" labor agreement that provides stability by setting the employment terms for a workforce performing labor at scattered locations for different employers. *See NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-95 (1957).

In arguing that collective bargaining here serves no "labor peace" interests, petitioners caricature that interest as solely an interest in preventing discord or violence at a particular physical workplace. Pet. Br. 25-26, 39.[16] But this Court has long used that phrase, as well as references to "industrial peace *and stabilized labor-management relations*," *Hanson*, 351 U.S. at 234 (emphasis added), as shorthand for the myriad benefits resulting from the negotiation and enforcement of a collectively bargained agreement covering an entire unit, and has recognized that such benefits extend far beyond preventing fights among employees and their supervisors. *See Abood*, 431 U.S. at 220-22, 224; *see also supra* at 16-18.

The collective bargaining system here, though relatively new, has channeled potentially disruptive labor demands into a mutually productive relationship whereby the State and union, through the sustained give-and-take of regulated bargaining, have negotiated three binding agreements; designed and administered new benefit, training, and orientation programs; established a dispute-resolution system; created continuing labor-management committees to develop

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[16] Petitioners cite *Perry*'s discussion of "labor peace within the schools" (Pet. Br. 26 (quoting *Perry*, 460 U.S. at 52)), but *Perry* nowhere held that the government's interest in exclusive representation is limited to contexts involving a common workplace.

solutions to workforce problems, including the development of a registry to connect workers and customers; and agreed to "no strike" obligations. Such innovations—tailored to the needs of this low-income, dispersed population working irregular hours—help to create a workforce of providers able to stay within the State program over a career, serving obvious and vital labor stability interests.

b. While the Seventh Circuit correctly held that Rehabilitation personal assistants *do* have a common-law employment relationship with Illinois, Pet. App. 9a-11a, if that were not the case the arrangements here would still be fully constitutional. As petitioners themselves admit, "the common-law employment test is particularly ill-suited for First Amendment line drawing; it has 13 factors, none of which is determinative." Pet. Br. 32 n.8. As the Court held recently in *NASA*, 131 S.Ct. at 758-59, "the Government's interest as 'proprietor' in managing its operations ... does not turn on such formalities." *See id.* at 759 (rejecting argument that constitutional claim by government contractors should be analyzed differently from claim by government employees); *Umbehr*, 518 U.S. at 673, 679-80 (applying same First Amendment framework to independent contractors and employees); *O'Hare*, 518 U.S. at 721-22 (same). Certainly in this case, the State's need for developing a stable and committed workforce within its program would remain undiminished.

Moreover, nothing about collective bargaining limits its utility to precise common-law lines. The workforce development it engenders is equally valuable whether or not the State meets a vague common-law "employer" test. Indeed, this Court considered and rejected the proposition that the public policy interests

served by collective bargaining are necessarily limited to common-law employer-employee relationships. *See NLRB v. Hearst Publications*, 322 U.S. 111, 126-28 (1944).[17] The nature of the States as separate sovereigns in our federal system counsels against imposing any limitation on their ability to legislate that turns on labels or common-law tests developed for unrelated purposes. *Cf. Guarnieri*, 131 S.Ct. at 2496 (describing "serious federalism and separation-of-powers concerns" posed by judicial involvement in a government's proprietary affairs).

c. Equally unpersuasive is petitioners' claim that Illinois' interest in stabilized labor relations turns upon whether state law defines personal assistants as employees for *other* state law purposes. This Court has recognized that "whether state law labels a government service provider's contract as a contract of employment or a contract for services [is] a distinction which is at best a very poor proxy for the interests at stake." *Umbehr*, 518 U.S. at 679. It cannot be dispositive that the Illinois Legislature, as a matter of state policy and to conserve limited public resources, did not classify the personal assistants as "employees" of the State for purposes of State tort liability or retirement benefits. *See id.* at 680 ("The applicability of a provision of the Constitution has never depended on the vagaries of state or federal law."). The State

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[17] Congress later amended the NLRA to overrule *Hearst*'s specific holding regarding NLRA coverage, but that legislative judgment does not bind the States or undermine this Court's recognition that the benefits of collective bargaining are not confined to common-law employment relationships. *See E.C. Atkins*, 331 U.S. at 413 (judgment whether "collective bargaining may appropriately be utilized" must be made "with more than the common law concepts in mind").

can engage in collective bargaining with its personal assistant workforce to establish their employment terms and advance its proprietary workforce development interests whether or not it waives sovereign immunity for their torts or includes them in a particular retirement plan.

B. Petitioners' Proposed Limitations On State Legislative Authority Should Be Rejected

Petitioners urge the Court to "limit" *Abood* by adopting a rule that state governments may *never* use systems of exclusive collective bargaining representation and fair-share fees to set employment terms unless: "(1) the government is actively managing and supervising the affected individuals in its workplaces, and (2) the representation does not extend to matters of public concern." Pet. Br. 24. Petitioners' rule should be rejected because it does not reflect the government's legitimate interests as a proprietor for First Amendment purposes, and it would require overruling *Abood*.

1. Petitioners do not offer a definition of "actively managing and supervising" a workforce, and their rule is not administrable in practice, nor does it reflect the wide variety of employment relationships. Here, for example, the State *does* "actively manage" its personal assistant workforce by establishing the tasks to be performed, defining compensable hours, setting wages, administering payroll, setting minimum qualifications, creating the required contract, providing health benefits, orienting and training personal assistants, approving selection decisions, attending annual reviews, negotiating a collective bargaining agreement, and resolving grievances. As for "active supervision" in a common "workplace,"

there are many employees who work independently in the field, rather than in common workplaces; some employees work in vehicles or telecommute from their own homes. Major private-sector employers such as Manpower and Kelly Services—as well as countless homecare agencies—place their employees with customers who "actively manage and supervise" those employees at customer worksites and homes.

Umbehr expressly rejected the claim that the government's proprietary interests turn upon its "right to supervise and control the details of how work is done." 518 U.S. at 676. And *Keller* upheld fair-share fees in a non-employment context where the very purpose was to permit "self-regulation" in place of government supervision and control. 496 U.S. at 12. Congress has never excluded employees who work independently and outside common workplaces from the NLRA's definition of "employee," *see* 29 U.S.C. §152(3), and the benefits of a system of exclusive representation apply with respect to such employees.

Accepting petitioners' argument that the State cannot extend its PLRA to cover its relationship with the personal assistants, simply because the State allows customers to choose and supervise their own personal assistants, also would put the interests of the State and the personal assistants at odds with customers' interests. The State should be able to decide for reasons of policy to give customers limited authority over personal assistants, while at the same time deciding for reasons of workforce development, fairness, and harmonious labor relations to engage in collective bargaining with the personal assistants' chosen representative.

2. Petitioners' "matters of public concern" test is equally arbitrary, unworkable, and without basis in

this Court's First Amendment decisions. As stated above, this case involves only collective bargaining about narrowly defined economic terms of employment. Petitioners make no effort to explain what subjects of public-sector collective bargaining constitute "matters of public concern" under their theory, but contend that public employee wages are *always* matters of public concern. Pet. Br. 42 n.12. Petitioners therefore effectively admit their proposed "limitation" requires *overruling Abood* based on a theory no Justice in *Abood*, including Justice Powell, accepted. *See* 431 U.S. at 263 n.16 (Powell, J., concurring).

Moreover, the very First Amendment decisions in which this Court has distinguished between matters of public and private concern in other contexts establish that public employee speech or petitioning regarding matters of public concern is *not* "automatically privileged" in the manner petitioners suggest—particularly within the employment context. *Guarnieri*, 131 S.Ct. at 2493. Rather, where a public employer's actions implicate such speech or petitioning, "[c]ourts balance the First Amendment interest of the employee against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* (quoting *Pickering*, 391 U.S. at 568).

Finally, this Court's well-developed First Amendment caselaw already protects employees' First Amendment rights as citizens. The designation of an exclusive bargaining representative cannot prevent employees from speaking as citizens in public fora about "matters of public concern" (or any other issues). *See supra* at 23-24. And fair-share fees must be limited to costs germane to the economic activity of

negotiating and enforcing a collective bargaining agreement. *See supra* at 30. No further restrictions are necessary or justified.

3. Petitioners ultimately urge the Court to adopt some bright-line limitation on the States' authority because *other* statutes may authorize fair-share fees outside the employment context or in employment contexts where, in petitioners' characterization, the State has neither retained the authority to set economic terms of employment nor empowered executive branch officials to negotiate binding contracts. Pet. Br. 51-55. This case is not the appropriate vehicle for considering those other statutes.

The Court has recognized that, for purposes of the First Amendment, the government's relationships with individuals "span a spectrum." *Umbehr*, 518 U.S. at 680. The government's employees are at one end of the spectrum, true independent contractors are somewhat further removed, and "recipients of small government subsidies" are treated "more like ordinary citizens." *Id.* This Court has declined to consider interests implicated in relationships not actually before the Court. *See, e.g., id.* at 685. While the Court has upheld fair-share fees in the context of exclusive representation systems that promote stabilized labor relations in a manner legally indistinguishable from the system here, other important government interests may be served by other systems, and any government entity that adopts such a system should have the opportunity to defend its system on its own terms. *See, e.g., Keller*, 496 U.S. at 12-16 (considering permissible use of mandatory dues for bar association).

CONCLUSION

The judgment below should be affirmed.

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REPLY BRIEF

No. 11-681

IN THE
Supreme Court of the United States

PAMELA HARRIS *et al.*,
Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

It is telling that, to save Illinois' provider unionization laws and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), Respondents resort to asserting that compelled association with a union is a mere "commercial association," subject to a deferential balancing test. In so doing, they necessarily seek to have this Court overrule its recent holding in *Knox v. SEIU, Local 1000* that compulsory unionism is "subject to exacting First Amendment scrutiny" and must be justified by compelling state interests. 132 S. Ct. 2277, 2289 (2012).

The Court should decline Respondents' invitation. Illinois is forcing homecare providers to support SEIU-HCII for an inherently expressive purpose—to "petition the Government for a redress of grievanc-

es," U.S. Const. amend. I. This warrants the most exacting constitutional scrutiny, as *Knox* held just two Terms ago.

Respondents ignore *Knox's* test because *Abood* did not apply the proper level of scrutiny when it imported Commerce Clause rationales for compulsory unionism into First Amendment jurisprudence. The time has come to overrule *Abood*. But even if *Abood* is not overruled, it should not be extended beyond the government workplace to private homecare providers reimbursed by a Medicaid program. Illinois' provider-unionization law fails both *Knox* tests.

The mandatory association here fails *Knox's* compelling-interest test because: (1) association cannot be compelled for the purpose of speech itself, *United States v. United Foods, Inc.*, 533 U.S. 405, 415-16 (2001); (2) Illinois lacks a "labor peace" interest in avoiding petitioning from diverse associations of providers; and (3) the State could bargain with one organization over its Medicaid rates without forcing providers to affiliate with that organization.

Even if this were "the rare case where a mandatory association [could] be justified," Respondents' compulsory fees fail *Knox's* necessary-incident test. 132 S. Ct. at 2289. The State could bargain with SEIU-HCII over Medicaid rates without forcing providers to support it financially, as the Union can rely on *voluntary* support for its agenda, like all other advocacy groups.

The Seventh Circuit should be reversed.

ARGUMENT

I. COMPELLED ASSOCIATION FOR PETITIONING GOVERNMENT IS SUBJECT TO EXACTING SCRUTINY.

A. *Knox*'s Exacting Scrutiny Test Controls.

1. *Knox* explained that "compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met." 132 S. Ct. at 2289. First, the mandatory association must "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). "Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* (quoting *United Foods*, 533 U.S. at 414).

The *Knox* test controls here. But Respondents and the United States ignore that test. They argue that the constitutionality of compulsory union fees should be evaluated under the *Pickering* balancing test, which "balance[s] . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ. of Twp. High Sch.*, 391 U.S. 563, 568 (1968). *See* State Br. 25-26; SEIU-HCII Br. 35-36; S.G. Br. 11. But *Knox* is clear: Exacting scrutiny applies to a case like this one involving "compulsory subsidies for private speech." 132 S. Ct. at 2289.

Knox is the latest in a long line of case law demanding heightened scrutiny of compelled expressive association. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Roberts*, 468 U.S. at 623. This includes compelled-association cases involving government employees and contractors, *e.g., Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996); and, most relevant here, compulsory union fee cases, *e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 & n.11 (1986) (procedure for extraction of such fees must "be carefully tailored to minimize the infringement") (citing strict-scrutiny cases).

This line of precedents is quite separate from "*Pickering* and its progeny," which "involve a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 466-67 (1995). The balancing test applicable to those cases is "a different, though related, inquiry [used] where a government employer takes adverse action on account of an employee or service provider's right of free speech"—in other words, in retaliation cases. *O'Hare*, 518 U.S. at 719.

But in the "'unusual' and 'extraordinary'" circumstance where a State *compels* expression by forcing workers to associate with an entity to petition government through collective bargaining, exacting scrutiny applies. *Knox*, 132 S. Ct. at 2291. *Knox* said so plainly. "*Far from calling for a balancing of rights or interests*," the Court wrote, precedent requires that "any procedure for exacting fees from unwilling contributors . . . must serve a 'compelling interest' and must not be significantly broader than necessary

to serve that interest." *Id.* (emphasis added). That is unequivocal. Respondents' attempt to invoke *Pickering* balancing cannot be squared with *Knox*.

2. The State and Solicitor General nonetheless assert that *Pickering* balancing should apply because collective bargaining is an "internal" proprietary matter that government has broad authority to regulate. State Br. 24-27; S.G. Br. 21. Providers agree that there is a difference "between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)); *see* Opening Br. 24-25. But that does not help Respondents here.

The way homecare providers petition Illinois over its Medicaid program is not an "internal" proprietary matter that the State has free rein to manage, any more than is petitioning by doctors or nurses over Medicaid policies. This is petitioning by citizens directed to the State in its capacity as regulator and lawmaker, and not that of a servant speaking to their master.

Nor is union collective bargaining with government a mere internal matter, like the workplace grievance of a lone employee, *see Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496 (2011). This petitioning concerns government policies of public concern, such as the operation of a Medicaid program here, which can affect thousands of individuals and the public fisc. Given its scope and impact, "[c]ollective bargaining in the public sector is 'political' in any meaningful sense of the word." *Abood*, 431 U.S. at 257 (Powell, J., concurring in judgment).

Illinois nonetheless argues that it has proprietary authority to manage the petitioning of personal assistants and others as government "employees" if the "State has sufficient control over the employment relationship to make collective bargaining meaningful." State Br. 14, 34; *see* S.G. Br. 28-30. According to the State, "[w]ithout sufficient control over the terms of employment, bargaining may be an empty exercise." State Br. 37. But whether mandatory bargaining is *possible* says little about whether it is *justified*.

A state's exertion of economic or regulatory control over a profession does not grant it proprietary authority to dictate how members of that profession petition the state. *See* Opening Br. 31-32. If it did, the First Amendment rights of millions who work in government-financed or regulated industries (such as medicine, education, utilities, defense, etc.) would be degraded. This Court cannot accept Illinois' conception of an *inverse relationship* between government regulation and First Amendment freedoms—i.e., that the more the government regulates an individual's profession, the fewer rights the individual has to choose with whom he associates to petition the government over those policies.

3. SEIU-HCII offers a second theory why *Knox*'s exacting scrutiny should not apply: it contends that collective bargaining is *commercial* association, not expressive association. That is untenable—and not just because *Knox* already answered the scrutiny question.

This Court has consistently explained that collective bargaining with government is political, and that "compulsory [union] fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment

rights.'" *Knox*, 132 S. Ct. at 2289 (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 455 (1984)). The Court recognized in *Knox*, for example, that "a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." 132 S. Ct. at 2289. And *Abood* itself stated that collective bargaining by public-employee unions "may be properly termed political," 431 U.S. at 231, and that "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." *Id.* at 222. These rationales have added force where, as here, "bargaining" concerns the operation of a public-aid program.

The Union nonetheless insists that collective bargaining is commercial because it is a regulated process, limited to a particular subject matter, that occurs in non-public fora. SEIU HCII Br. 24-25, 32-34. But none of these attributes changes the relevant fact that a union is petitioning government over policy matters in this bargaining. Most lobbying of government officials occurs behind closed doors and is limited to particular subjects.

Certainly, government cannot transform core expressive activity—like petitioning over Medicaid rates—into a non-expressive, commercial activity merely by creating a regulated process for that petitioning. The proposition is not only illogical, but limitless. If accepted, the very act of subjecting a policy issue to a collective-bargaining process would constitutionally justify itself.

SEIU-HCII offers two authorities in support of its commercial-association theory: Justice Powell's concurrence in *Abood*, and *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). SEIU-HCII Br. 21,

29. Neither aids its position. Justice Powell's concurring opinion in fact *refutes* the union's argument. In his view, exacting scrutiny should apply to all compulsory union fees, 431 U.S. at 259-60, because there is no "basis here for distinguishing 'collective-bargaining activities' from 'political activities' so far as the interests protected by the First Amendment are concerned." *Id.* at 257. To be sure, he hypothesized in a footnote that bargaining over salaries or benefits might potentially survive such scrutiny, *id.* at 263 n.16—but he nevertheless maintained that exacting scrutiny was the proper standard.

The union fares no better with *Glickman*. The marketing cooperative in that case was upheld as an economic regulation because it primarily performed regulatory functions unrelated to expressive activity. 521 U.S. at 460-62, 477. In contrast, a public-sector union's primary function is expressive—to petition the government. *Glickman* itself distinguished the situation before it from compelling support for unions, *id.* at 470-73, "which arguably always poses some burden on First Amendment rights," *id.* at 473 n.16; *see United Foods*, 533 U.S. at 411-16.

Finally, even if some subjects of collective bargaining might be deemed economic, that makes no difference. "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters"; no matter the topic, "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). *United Foods* itself involved economic speech—commercial advertising for mushrooms. 533 U.S. at 411. Yet compelling association to generate that commercial speech was held

unconstitutional. *Id.* at 416-17. Petitioning the government over Medicaid rates and policies lies on a higher plane of First Amendment activity than advocating for greater mushroom consumption.

B. Respondents' Other Threshold Arguments Fail.

1. Perhaps recognizing the weakness of their merits argument given *Knox*, Respondents maintain that the propriety of exclusive representation is not before the Court because the Complaint challenges only forced fees. State Br. 30; SEIU-HCII Br. 16. But the two are intertwined, as *Abood* itself recognized.[1] *Knox's* first test asks whether the "mandatory association" subsidized by a compulsory fee is justified by a compelling state interest. 132 S. Ct. at 2289. Thus, to determine if the compulsory fee here is constitutional, the Court must determine if SEIU-HCII's mandatory representation is narrowly tailored to advance a compelling state interest. One issue necessarily leads to the next; both are fairly presented.

2. The propriety of *Abood* is also before the Court. Supreme Court Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." The first question presented is whether a state may "compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the State[.]" Pet. i. The Seventh Circuit held, and Respondents argue, that *Abood* justifies this compulsion. Provid-

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[1] In *Abood*, to determine the constitutionality of exacting compulsory union fees from employees, 431 U.S. at 211, the Court first looked to whether "governmental interests" justified "exclusive union representation." *See id.* at 220-22, 224.

ers' response that *Abood* does not, because it should be overruled under the principles delineated in *Knox* (which was decided after the Providers' certiorari petition was filed), is a legal argument well within the scope of the question presented. "'[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). Indeed, the Court cannot apply *Abood's* labor-peace and free-rider rationales without passing on the validity of those rationales.

3. As a last-ditch effort to evade *Knox*, Respondents contend that Petitioners' mandatory-association argument should be rejected because this Court already decided the issue in *Minnesota State Board v. Knight*, 465 U.S. 271 (1984). Not so. *Knight* does not hold that it is constitutional to compel individuals to associate with an exclusive representative; indeed, the "case involve[d] no claim that anyone is being compelled to support [union] activities." *Id.* at 291 n.13; *see also id.* at 289 n.11. Rather, *Knight* holds that *excluding* individuals from union bargaining sessions is constitutional because "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283.

Of course, that Illinois can choose to whom it *listens* under *Knight* does not mean that the State can dictate who shall *speak* for the Providers. An example proves the point. If Governor Quinn decided only to confer with SEIU-HCII over his Medicaid policies, this would not offend the First Amendment; he can confer with whomever he wants under *Knight*. But

the State's law is not so limited. It dictates not only to whom the Governor must listen, but also who shall speak for every provider by designating an exclusive representative to petition for them. This designation thrusts providers into a fiduciary relationship with SEIU-HCII, akin to "that between attorney and client," *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74 (1991), and inextricably affiliates them with the union's petitioning and policy positions. That is compelled association for an expressive purpose, subject to exacting First Amendment scrutiny.

II. ILLINOIS' PROVIDER UNIONIZATION LAW IS UNCONSTITUTIONAL.

A. Illinois' Scheme Fails the First *Knox* Test Because Mandatory Representation Is Not the Least Restrictive Means to Satisfy a Compelling State Interest.

1. *Knox's* first test requires that a mandatory association be the least restrictive means to satisfy a compelling state interest. 132 S. Ct. at 2289. Mandatory union representation cannot satisfy this requirement because its purpose is expressive, namely to "petition the Government for a redress of grievances," U.S. Const. amend. I. That is all that collective bargaining in the public sector entails: a union speaking to government to obtain benefits for itself and those it represents. Or, as the Solicitor General puts it, collective bargaining is "a mechanism for employees to speak with one voice at the bargaining table." S.G. Br. 23. But that will not do, because association cannot be compelled for the purpose of generating "speech itself." *United Foods*, 533 U.S. at 415-16. *Abood* should be overruled for this reason. *See* Opening Br. 22-23; Amicus Br. of Cal. Pub. Sch. Teachers *et al.* 18-22 ("Teachers' Amicus Br.").

Even if *Abood* is not overruled, Illinois' scheme violates this Court's *existing* prohibition on compelling support for union "lobbying" activities that relate to "financial support of the employee's profession." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520-22 (1991) (plurality opinion); *accord id.* at 559 (Scalia, J., concurring in relevant part). An organization petitioning a state for more monies from a Medicaid program is quintessentially lobbying. *See* Opening Br. 40-42. That SEIU-HCII's petitioning on this topic occurs within a regulated bargaining process does not, as the Union claims, alter its expressive and ideological nature. *See* p. 7, *infra*.

2. Respondents argue that Illinois' mandatory-association law nonetheless is justified by the State's interest in "labor peace." That contention fails for several reasons.

First, *Abood* erroneously elevated "industrial peace" from a Commerce Clause interest for allowing mandatory union representation into an interest that justifies infringing on First Amendment rights. This interest is not cognizable, much less compelling, when government is involved because "'conflict' in ideas about the way in which government should operate [i]s among the most fundamental values protected by the First Amendment." 431 U.S. at 261 (Powell, J., concurring in judgment).

The Union argues that providers remain free to associate with other organizations to petition the State over its Medicaid rates. SEIU-HCII Br. 23-24; *see* S.G. Br. 12, 25. This is not exculpatory. Government cannot compel association merely because citizens may have other First Amendment rights remaining. *Cf. Miami Herald v. Tornillo*, 418 U.S. 241, 256-57 (1974). If anything, that homecare providers can still

petition the State other than through SEIU-HCII proves that Illinois has not suppressed competing demands from them, and thus has not achieved labor peace, as *Abood* defines it. *See Lehnert*, 500 U.S. at 521 (labor-peace rationale does not apply to lobbying activities because "our national and state legislatures, the media, and the platform of public discourse are public fora open to all").

Second, even if labor peace were a cognizable interest in other circumstances, it is not here. Diverse provider petitioning about Medicaid policies cannot disrupt internal State operations because the State does not manage providers in its workplaces.[2] Moreover, Medicaid policies—the topic of bargaining here—are matters of public concern, and the State has no more legitimate interest in suppressing diverse provider petitioning on this subject than it does in suppressing the ability of doctors or nurses to lobby the State over its Medicaid rates through diverse associations. *See* Opening Br. 24-31, 39-42.

The State argues that it has a labor-peace interest because it is the providers' joint employer at common law. Br. 36-40, 48-53. SEIU-HCII, however, rejects a common law analysis. Br. 54-55. More importantly, this Court rejects the proposition that constitutional rights turn on such common-law labels, because they do not reflect the interests at stake. *See O'Hare*, 518 U.S. at 719-22. Here, irrespective of what other par-

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[2] Respondents assert that Illinois exerts some managerial control over providers because a "service plan" establishes what services the Rehabilitation Program will subsidize. To the contrary, the purpose of this physician-approved plan is not managerial, but to determine what care is medically necessary. *See* Opening Br. 45. Moreover, the service plan's contents are not subject to bargaining.

allels may exist between providers and public employees, they differ in that Illinois lacks a managerial interest in avoiding petitioning from diverse provider groups over its Medicaid policies.

Homecare providers are not the State's common-law employees in any event. They are not even State contractors. They are individuals whose services to other citizens are paid for by a Medicaid program. *See* Opening Br. 44-45. Their relationship with government is little different from that of other private healthcare workers who serve Medicaid or Medicare patients. *Id.* at 51-53. It is for good reason that even Illinois law recognizes that providers are not State employees, except, of course, for the sole purpose of unionization. 20 Ill. Comp. Stat. 2405/3(f).

Third, even if Illinois did have a "labor peace" interest in not bargaining with diverse associations of providers, forcing providers to associate with SEIU-HCII is not the least restrictive means to advance that interest. Illinois could simply choose not to bargain with any organization over its administration of the Rehabilitation Program. This would be consistent with how government agencies administer the vast majority of public programs.

Illinois could also choose to bargain with a single organization, such as SEIU-HCII, *without* forcing providers to affiliate with and support it. *See* Teachers' Amicus Br. 29-30. Given that Illinois has discretion under *Knight* to choose with whom it deals, it is impossible to accept that the State needs to force providers to support SEIU-HCII to avoid dealing with other organizations.

That two unions—SEIU Local 73 and AFSCME Council 31—seek to represent personal assistants in the Disabilities Program proves the Providers'

points. If personal assistants petitioned the State for changes to this Medicaid program through both organizations, would this disrupt the internal functions of any State workplace? Would the State have any legitimate interest in quashing this diverse petitioning? Would the State have to force the personal assistants into one organization to avoid bargaining with the other? The obvious answer to these questions is "no"; which shows why the labor peace rationale has no purchase here.

3. Unable to demonstrate a labor-peace problem, Respondents attempt to redefine labor peace as "shorthand for the myriad benefits resulting from the negotiation and enforcement of a collectively bargained agreement covering an entire unit," whose "benefits extend far beyond preventing fights among employees and their supervisors." SEIU-HCII Br. 53. Thus, the argument goes, collective bargaining improves working conditions, which then improves worker productivity and retention, which in turn improves services funded by government. *See id.* at 13, 39, 51-54; State Br. 34-35, 54; S.G. Br. 23.

There are three major problems with this attenuated theory. *First*, it has no basis in case law. The labor-peace interest stated in *Abood* referred only to problems ostensibly caused by rival unions. 431 U.S. at 220-21, 224. This Court has never held compulsory unionism constitutional because it helps workers extract more money and benefits from government, thereby improving their services to the public.

Second, Respondents never identify *how* collective bargaining supposedly improves working conditions and government services. They and their amici refer to collective bargaining as if it were a magical ritual whose very performance causes benefits to material-

ize. But collective bargaining involves little more than government officials talking to union officials about government policies. So how, exactly, does Illinois speaking with SEIU-HCII about how it should administer aspects of the Rehabilitation Program improve provider benefits or this Medicaid program? Respondents never say.

Their reticence is understandable. The only way to link their means to their end is the untenable notion that the State needs SEIU-HCII's input to decide *what* changes to make to this Medicaid program. But this is the "feedback" rationale stated in Executive Orders 2003-08 and 2009-15 (Pet. App. 46a, 49a), which Respondents themselves now disavow. *See* State Br. 22 n.3; SEIU-HCII Br. 49 n.13. And for good reason. Government cannot compel association just to generate speech about public affairs. *See* p.11, *supra*. Even if it could, Illinois does not have a "compelling" need for SEIU-HCII's advice on how to operate a Medicaid program. And forcing all providers to support SEIU-HCII is not the least restrictive means to obtain its ostensible expertise in any event, as the State could confer with the Union without this compulsion. *See* Opening Br. 42-44, 46-48.

Third, collective bargaining is not necessary, much less the least restrictive means, for Illinois to improve provider benefits or the Rehabilitation Program. If the State wants to increase provider reimbursement levels, subsidize health benefits, create a provider registry, or make any other changes to the program, *it can simply do so*. Illinois does not need SEIU-HCII's approval.

Illinois' contract with SEIU-HCII illustrates the point. Illinois could set reimbursement rates stated in Article VII (J.A. 44), or contribute directly to a

health-insurance carrier (J.A. 44-45), without this contract. And the contract acknowledges the State's right to "manage, direct, and control all of the State's activities to deliver programs and services," and to "determine the methods and means by which operations are to be carried out." Art. V (J.A. 41).

Most of the contract is devoted not to provider benefits in any event, but to assistance the State will give to SEIU-HCII itself. This includes lists of personal information about providers, a gag-clause on State speech about the union, and a State commitment to mail union membership materials to new providers. Art. IV (J.A. 38-40). And, of course, the State agreed to seize compulsory union fees from all providers. Art. X, § 6 (J.A. 50-51). These exactions were estimated to annually exceed $3.6 million (J.A. 25), and actually averaged $10.4 million annually between 2009 and 2013. *See* Amicus Br. of Ill. Policy Inst. 15-16. These exactions inure to SEIU-HCII's benefit. They do not improve the Providers' lot, much less benefit persons with disabilities enrolled in the Rehabilitation Program.

4. Respondents also vaguely claim that exclusive representation will "stabilize" the personal assistant workforce. State Br. 41; SEIU-HCII Br. 49. But, again, they never explain exactly what that means. How, exactly, are personal assistants "unstable" unless forced to associate with SEIU-HCII?

Perhaps "stabilize" means reducing turnover rates. But forcing providers to pay union fees is an odd way to induce them not to change jobs. After all, any provider could *voluntarily* choose to join SEIU-HCII if he or she desires. Government-compelled association

cannot be justified as means for "improving workforce morale," S.G. Br. 23.[3]

Or, perhaps "stabilize" is another catchword for "labor peace," replacing the ostensible instability of providers' petitioning the State through diverse associations with the "stability" of one mandatory advocate. If that is Respondents' meaning, it violates the pluralistic principles upon which our system of government is predicated. *See* Opening Br. 26-27, 39-40. The democratic process is predicated on citizens choosing their representatives in government, not on government choosing a representative for citizens.

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In the end, Respondents' case hinges on the empty phrases "labor peace" and "stability." But the State cannot infringe on First Amendment freedoms by invoking vacuous platitudes. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *see Knox*, 132 S. Ct. at 2291 & n.3. This Court has repeatedly held mandatory associations unconstitutional when the asserted state interest, even if compelling in other contexts, did not justify the mandatory association. *See, e.g.*, *Dale*, 530 U.S. at 656-59; *Hurley v. Irish-Am. Gay, Lesbian &*

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[3] It also makes no sense under Illinois' scheme: Homecare providers are selected, hired, and fired by persons with disabilities—not the State. *See* Opening Br. 6-7. Many are family members of the person they serve. *See* J.A. 16-18. Whether a person with disabilities wants to retain a particular individual to assist her with basic living functions in her home is an issue between them, not the State.

Bisexual Grp., 515 U.S. 557, 572-73 (1995); *Elrod*, 427 U.S. at 364-66; *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). So too here. If the labor-peace rationale is valid at all, it does not justify collectivizing homecare providers.

Illinois' scheme thus fails the first *Knox* test. And even if *Knox* were overruled in favor of *Pickering* balancing, Illinois' provider-unionization law fails that test for the same reasons. The fundamental right of homecare providers to choose with whom they associate to petition government far outweighs Illinois' non-existent labor-peace interest in avoiding petitioning from diverse groups of providers.

B. Illinois' Compulsory-Fee Requirement Fails the Second *Knox* Test Because It Is Not a "Necessary Incident" of the Mandatory Association.

Even if this were "the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Knox*, 132 S. Ct. at 2289 (quoting *United Foods*, 533 U.S. at 414).[4]

1. Illinois' extraction of compulsory fees from providers cannot satisfy this test because the purpose of SEIU-HCII's representation is expressive—to petition the State over the Rehabilitation Program. This Court has never "upheld compelled subsidies for speech in the context of a program where the princi-

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[4] Respondents' assertions that the state interests that justify a mandatory association automatically justify compelled funding of it, *see* State Br. 21-23; SEIU-HCII Br. 42-43, would nullify *Knox's* second test, and thus cannot be reconciled with *Knox*.

pal object is speech itself." *United Foods*, 533 U.S. at 415.

Respondents' rejoinder is that union representation is part of a larger regulatory scheme of administering the Rehabilitation Program. But the question is whether the mandatory association *itself* has nonexpressive regulatory functions. *See id.* at 414-16. For example, compelled funding for the tree-fruit cooperative in *Glickman* was upheld because it mostly performed regulatory functions unrelated to speech. *See United Foods*, 533 U.S. at 415-16. In contrast, compelled funding of the Mushroom Council in *United Foods* was unconstitutional because its primary purpose was to generate speech. *Id.* This case is like *United Foods*, as SEIU-HCII's statutory function is to speak with (i.e., petition) the State.

2. The "free-rider" rationale for compulsory fees is unavailing for the reasons stated in *Knox*, 132 S. Ct. at 2289-90, and pages 34-36 of the Opening Brief. *See* Teachers' Amicus Br. 24-29. The possibility that homecare providers could benefit from SEIU-HCII's petitioning does not justify forcing providers to pay for this unsolicited advocacy.

Respondents contend that SEIU-HCII's statutory authority to represent all providers distinguishes it from the examples cited in *Knox*, which involved organizations that voluntarily engage in advocacy efforts that benefit others. *See* State Br. 45-48; SEIU-HCII Br. 40-42. But the Union demanded and voluntarily assumed the power to represent providers vis-à-vis the State. Indeed, Respondents' contention turns reality on its head; it is not SEIU-HCII that is being forced to represent nonmember providers against its will, but nonmember providers who are

being forced to accept SEIU-HCII's representation against their will.

If SEIU-HCII truly finds the crown of exclusive representation to be a heavy one, it can simply disclaim this power and free itself of the ostensible burden of speaking for dissenters. The least restrictive solution to any free-rider problem here is not compulsory fees, but for the union not to take nonmembers for an involuntary ride.

3. Finally, compulsory union fees are not "necessary" to achieve the "*regulatory purpose* which justified the required association," *United Foods*, 533 U.S. at 414 (emphasis added), which here is a state's ostensible labor-peace interest in not dealing with rival unions. States can achieve this interest by dealing with only one union, funded by its voluntary members. *See* p. 14, *supra*. States do not need to extract compulsory fees for that union just to deal exclusively with it.

SEIU-HCII, however, claims that "[exclusive] representation will not be adequately funded absent compulsory fees." Br. 40. This claim cannot be reconciled with the fact that exclusive representation functions without compulsory fees in the federal government, postal service, and two dozen Right to Work states. *See* Opening Br. 36. There is no reason to believe unions cannot fund their activities through *voluntary* support, like all other advocacy groups.

Exclusive-representative status is not an impediment to obtaining such support, as the Union implausibly asserts. Br. 40-42. The status grants unions control or influence over individuals' jobs, benefits, and relations with their employer (or here, the State), and thus significant leverage to induce those individuals to join and support the organization.

In the end, unions seek the mantle of exclusive representation, even without compulsory fees, because it is an extraordinary *power*. It grants a union a monopoly on dealing with government over certain policies, and the authority to speak and contract for all individuals in a group, whether they approve or not. Compulsory fees are not necessary to induce unions to seek exclusive-representative status, and thus are not "necessary" for a state to achieve any labor-peace interest it may have in bargaining with one union.

C. Respondents' Approach Lacks a Limiting Principle.

1. The Providers explained in their opening brief that upholding Illinois' scheme will open the door to the collectivization of many who receive government money for a service. Opening Br. 49-56. This includes the medical profession, childcare businesses, government contractors, *id.* at 50-55, and even foster parents. Amicus Br. of Albert Contreras *et al.* 21-22; *see* Amicus Br. of Mackinac Ctr. 3-16.

Respondents ask this Court not to consider these implications, because they are not (yet) before the Court. *See* SEIU-HCII Br. 59; State Br. 55-56. But Illinois wants this Court to broadly hold that "government may compel financial support for cooperative activity, so long as the support *serves a legitimate government purpose* and is limited to a proportionate share of the costs germane to that purpose." State Br. 13 (emphasis added). SEIU-HCII, for its part, wants this Court to deem mandatory representation for bargaining with government a mere "economic association" not subject to exacting First Amendment scrutiny, Br. 10, and to hold that *Abood* is *not* limited to the employment context. *Id.* at 54-55. Either holding would reach much farther than

the specific facts of this case—and would include the examples Providers offered in their Opening Brief.

The Court should not countenance such broad authority to compel association for petitioning government. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . " *United Foods*, 533 U.S. at 411. Given that Respondents' legal theories lack acceptable limiting principles, their theories should be rejected.

2. SEIU-HCII attempts to turn the tables by asserting that overruling or narrowly construing *Abood* will endanger mandatory bar associations and private-sector labor laws like the National Labor Relations Act. Br. 44. This does not follow.

Mandatory bar associations are justified by a compelling interest not at issue here—a "State's interest in regulating the legal profession and improving the quality of legal services." *Keller v. State Bar*, 496 U.S. 1, 14 (1990). The outcome of this case will not impact that holding one way or the other.

The NLRA will not be affected by holding it unconstitutional to unionize independent homecare providers because they are not covered by the law. *See* Amicus Br. of Mackinac Ctr. 5. Even overruling *Abood* will not necessarily affect the NLRA because *Abood's* primary infirmity is that public-sector bargaining is "petition[ing] the Government for a redress of grievances" under the First Amendment. That obviously cannot be said of union bargaining with private employers.

III. THE DISABILITIES PROGRAM PROVIDERS' CLAIMS ARE RIPE.

Respondents prove too much in arguing that the constitutional claims of Pamela Harris and other Disabilities Program providers are not ripe because they might not be unionized. This possibility will exist right up until the very moment they *are* unionized, causing irreparable harm to their fundamental First Amendment rights. *See Elrod*, 427 U.S. at 373. The Disability Providers should not be forced to "'await the consummation of threatened injury to obtain preventive relief.'" *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923)). Their claims are ripe for adjudication now.

CONCLUSION

The Seventh Circuit's judgment should be reversed.

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IN THE

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v.

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Respondents.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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IN THE

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v.

PAT QUINN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ILLINOIS *et al.*,
Respondents.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

Presenting the views of the United States, the Solicitor General assumes the answer to the fundamental question before this Court: what legal standard determines whether individuals can be collectivized for purposes of petitioning government under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)? Like the Court of Appeals below, the Solicitor General argues that this inquiry turns on a common-law agency analysis. U.S. Br., 13-15. However, also like the appellate court, the Solicitor General offers no reasons justifying application of this test. He simply declares it to be controlling, *ipse dixit*.

As shown below, this test is both inapposite and overly inclusive. *See also* Pet. Reply to State Opp. Br., 2-6. Because an ever-increasing variety of publicly-funded service providers are being forced to associate with mandatory representatives, the Court should take this case to establish a proper legal standard that requires that states demonstrate a compelling interest before dictating how citizens petition government.

I. The Solicitor General's Standard for Evaluating the Constitutionality of Compelled Representation Is Inappropriate and Too Expansive

In *Knox v. SEIU Local 1000*, this Court reiterated that "mandatory associations are permissible only when they serve a 'compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" 132 S. Ct. 2277, 2289 (2012) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). A common law employment test has no place in this constitutional analysis because it does not address whether compulsory representation serves a compelling interest. Indeed, in *O'Hare Truck Service v. City of Northlake*, this Court explained at length that associational rights do not turn on such common law distinctions. 518 U.S. 712, 722-24 (1996). The test supported by the Solicitor General is inappropriate under both *Knox* and *O'Hare*.

Even if common law factors were controlling, the Solicitor General and lower court erase the distinction between "employees" and "contractors" by asserting that providers can be deemed jointly employed by government if only some indicia of an employment relationship are present. U.S. Br., 14-

17. But, when a hiring party's overall degree of control falls short of establishing an employment relationship, that results in merely a contract relationship at common law. *See Community for Creative Non-Violence v. Reid* ("*CCNV*"), 490 U.S. 730, 751-52 (1989). The Solicitor General's partial-employment concept robs "employee" of its meaning, and could encompass almost any minimal contracting relationship.

For example here, the Solicitor General concedes that Illinois does not "exclusively exercise the complete range of authority characteristic of an employer." U.S. Br., 17. This means that personal assistants are *not* employed by the State at common law, but rather that a lesser contracting relationship may exist between them. *Compare CCNV*, 490 U.S. at 751-52 (finding that a sculptor paid to perform a task is a contractor because the hiring organization did not exercise enough overall control to make it an employer). But, according to the Solicitor General, Illinois' limited degree of authority just makes it a joint employer of personal assistants.[1]

The ramifications of this elastic concept of partial-employment are immense. States could designate mandatory advocates for anyone who merely shares *some* characteristics of a public employee, or perhaps

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[1] The Solicitor General suggests that it is relevant that persons with disabilities who hire personal assistants may not have all characteristics of an employer, such as control over reimbursement rates. *See* U.S. Br. at 17-19. It is not relevant because personal assistants are being forced to support a representative to deal only with *the State*, and not with their clients. Thus, the pertinent issue is whether Illinois' relationship with personal assistants is sufficient to constitutionally justify compulsory representation vis-à-vis the State.

just one. Consider the three factors that the Solicitor General asserts renders Illinois a co-employer of personal assistants: that its Medicaid program (1) pays for their services, U.S. Br., 16; (2) specifies which services for which it will pay, *id.* at 15; and (3) sets minimum qualifications for who it will pay to perform those services, *id.* at 17. If that is all that is necessary to make someone a public "employee" and justify compulsory representation vis-à-vis a state, then the associational rights of anyone accepting government money for their services are at grave risk. *See* Pet. 21; *Amicus* Br. of the Cato Institute et al., 18-21.[2]

The threat is not hypothetical. Twelve (12) states have already authorized mandatory representation for individuals providing home-based care to Medicaid recipients, and sixteen (16) states have authorized mandatory representation for small businesses or family members providing daycare to children on public assistance programs, though some provisions have since been repealed. Pet. 22-23. The situation continues to evolve. For example, California is currently considering a bill to designate compulsory representatives for those providing interpretation and translation services in connection with its Medicaid program. *See* CA Assembly Bill No. 1263 (2013-14).

It is therefore imperative that this Court reject the partial-employment test adopted by the lower court and Solicitor General—as it both fails to consider

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[2] The Solicitor General's reliance on these three factors also aptly illustrates why its common law test is inappropriate for adjudicating constitutional rights. Not one of these factors proves that Illinois has a compelling reason for forcing personal assistants to support the SEIU.

constitutionally relevant factors and is overly inclusive—and establish a proper legal test for determining when government can appoint mandatory representatives to speak for citizens.

II. A Proper Legal Standard Must Focus on Whether the State Has a Compelling Interest in Requiring Exclusive Representation

The test for whether mandatory representation is constitutional must focus not on common law factors, but rather on a state's interest, if any, in regulating the expressive activity. Namely, a state must demonstrate that it possesses a "compelling . . . interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms" for requiring that individuals petition it through a designated representative. *Knox*, 132 S.Ct. at 2289, 2291.

Illinois lacks a legitimate, much less compelling, reason for forcing personal assistants to support the SEIU to lobby the State over its Medicaid rates for homecare. *See* Pet., 10. This Court has never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *United States v. United Foods*, 533 U.S. 406, 415 (2001). Here, the principal object of Illinois' scheme is to compel support for an express First Amendment activity: "petition[ing] the Government for a redress of grievances." U.S. Const. amend I.[3]

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[3] The Solicitor General wrongly asserts that Petitioners "do not contend that the financial support they provide to the union is used for any purpose other than collective bargaining activities," U.S. Br. at 14 n3, and that they do not contest the validity of imposing exclusive representation on personal assistants. *Id.* at 21. Neither is true. The very basis of Petitioners'

The State cannot claim a "labor peace" interest in requiring that personal assistants petition it through an *exclusive* representative because it cannot assert any cognizable interest in preventing them from petitioning it through *multiple* organizations or as individuals. *See* Pet., 11-19. The Solicitor General dispatches a strawman by contending that the labor peace rationale does not depend on a "centralized workplace." U.S. Br., 20. Petitioners' point is not that personal assistants' workplaces are physically dispersed. Rather, it is that these care providers do not work in government workplaces at all and are not managed by the State. Accordingly, the State cannot claim that its workplaces will be disrupted, or managerial functions impeded, if personal assistants petition the State over its Medicaid rates through diverse associations. *See* Pet., 15-19.

The Solicitor General then claims that the State's very act of granting exclusive representation to SEIU creates a labor peace interest in avoiding petitioning from rival representatives, and that in turn spawns a "free-rider" interest in forcing personal assistants to pay for that representation. U.S. Br., 21. This

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suit is that it is unconstitutional to compel them to accept and support a "state designated representative for the purposes of speaking to, petitioning, and otherwise lobbying the State and its officials." Complaint, ¶¶ 46 & 48 (1:10-cv-2477, Dkt. 1 (April 22, 2010)). That some of this speech and petitioning may include "bargaining" with State officials over Medicaid policies does not diminish the ideological and expressive nature of this petitioning. *Cf. Knox*, 132 S. Ct. at 2298 ("Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences . . . compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'") (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)).

circular logic is as untenable as it is limitless. Government cannot invent a problem to justify infringing on First Amendment rights. If it could, the mere act of imposing an exclusive representative on citizens would constitutionally justify itself.

Moreover, after *Knox*, the government can no longer rely on the so-called "free-rider" rationale to justify compelling support for state-appointed representatives. *Knox* held that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections," and gave as an example that "'[i]f a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.'" 132 S.Ct. at 2290-91 (quoting Summers, Book Review, Sheldon Leader, Freedom of Association: A Study in Labor Law and Political Theory, 16 Comp. Labor L. J. 262, 268 (1995)). Similarly here, that SEIU chooses to lobby the State over its Medicaid rates for homecare services does not, either legally or ethically, create an obligation for all homecare providers to subsidize this expressive activity.

Finally, the Solicitor General argues that "a collective bargaining system that gives personal assistants a greater stake in both the process and outcome" can address the State's interest in "avoiding 'high turnover, low morale, excessive absenteeism, poor training, and lack of productivity.'" U.S. Br. at 21 (quoting State Br. at 17). This is not the "labor peace" interest recognized in *Abood*, 431 U.S. at 221, 224. Moreover, it defies credulity—and there is no record below to suggest—that compelled association with the SEIU fills providers with such feelings of personal empowerment that their job performance improves. Even if the Solicitor General's argument were plausible, the asserted rationale is incognizable because states

cannot force individuals into advocacy organizations just to give them a "greater stake" in the political or policy making process than they would otherwise assume on their own volition. "The government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791 (1988).[4]

Of course, in reality Illinois is forcing personal assistants to associate with the SEIU not to obtain labor peace, improve its Medicaid program, or for any other salutary policy objective. Illinois is forcing personal assistants to subsidize this special interest group to increase the political power and resources of this special interest group. This objective is antithetical to the values and democratic process that the First Amendment exists to protect. *See* Pet. 25-27; *Amicus* Br. of Center for Constitutional Jurisprudence, 3-9.

In short, no compelling interest justifies forcing personal assistants and other service providers to petition their government through state-appointed advocates. Accordingly, "[t]he general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail." *Knox*, 132 S. Ct. at 2295.

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[4] *Cf. Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987) (state cannot regulate a party's associational rights on grounds that it is in the party's best interests); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010) ("reject[ing] the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

CONCLUSION

Compelling even actual public employees to support a monopoly bargaining representative is an "extraordinary" and "unusual" exercise of governmental power, *id.* at 2291 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184, 187 (2007)), that "imposes a 'significant impingement on First Amendment rights,'" *id.* at 2289 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). The Court has deemed its tolerance for this practice to be "something of an anomaly," *id.*, 132 S. Ct. at 2290, and implicitly questioned "whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake." *Id.* at 2289.

This case squarely presents the issue of whether compulsory representation can be extended beyond actual public employees to private citizens whose services are merely paid for by public-aid programs. This is a question of the utmost importance that warrants this Court's immediate review. The writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

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No. 11-681

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v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

A "fair share" provision of a collective-bargaining agreement between the State of Illinois and a union representing certain personal assistants providing in-home care requires personal assistants who are not members of the union "to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." Pet. App. 5a (quoting collective-bargaining agreement). The questions presented are:

1. Whether the fair-share provision is consistent with the requirements of the First Amendment because the personal assistants subjected to it are employees of the State of Illinois.

2. Whether a First Amendment challenge brought by other personal assistants to the possible inclusion of a similar fair-share provision in a future collective-bargaining agreement is ripe even though those personal assistants voted against union representation, no collective-bargaining agreement exists, and the personal assistants are not subjected to any fair-share requirement.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The principal question presented in this case is whether the First Amendment allows the State of Illinois to require individuals it pays to furnish in-home medical care to remit a fee to a union for their proportionate share of the union's costs of collective bargaining and related activities. The United States pays a portion of the cost of such care under the Medicaid Program, and federal statutes allow comparable union-fee assessments in the private sector. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reprinted in the appendix to this brief. App., *infra*, at 1a-50a.

STATEMENT

1. a. As originally enacted in 1935, the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, allowed an employer and a union to enter into a "closed shop" agreement requiring the employer to hire only members of the union. See *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 747 (1988). "By 1947, such agreements had come under increasing attack," and Congress outlawed them that year in the Taft-Hartley Act, 29 U.S.C. 141 *et seq.* *Beck*, 487 U.S. at 748. At the same time, however, Congress was concerned "that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts." *Ibid.* The Taft-Hartley Act therefore amended the NLRA to permit employers to enter into "union security" agreements requiring employees to become members of a union soon after being hired, but forbidding their discharge based on the agreement for any reason other than a failure to pay dues. See *id.* at 749; 29 U.S.C. 158(a)(3).

Four years later, citing the "same concern over the resentment spawned by 'free riders' in the railroad industry," *Beck*, 487 U.S. at 750, Congress amended the Railway Labor Act (RLA) to authorize railroads to enter into union-security agreements. 45 U.S.C. 152 (Eleventh). Unlike the NLRA provision, however, the RLA provision preempts state laws banning such agreements. Cf. 29 U.S.C. 164(b).

Soon after that amendment, the Supreme Court of Nebraska held that the RLA provision, by overriding an employee's state-law right not to join a union, violated the First Amendment's guarantee of freedom of expressive association. See *Hanson* v. *Union Pac. R.R. Co.*, 71 N.W.2d 526, 545-547 (1955). In *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956), this Court reversed that holding. It first concluded that in States where the RLA preempts state law, the negotiation and enforcement of private-sector union-security agreements constitutes governmental action subject to the First Amendment. *Id.* at 232; see *Beck*, 487 U.S. at 761. The Court then rejected the "wide-rang[ing]" First Amendment arguments that the challengers had presented, including that "the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought." *Hanson*, 351 U.S. at 236-238. The Court explained that with respect to the payment of fees to support the union's collective-bargaining activities, there was no more of an impairment of First Amendment rights than there is in requiring a lawyer to become a member of an integrated bar. *Id.* at 238. Although the challengers argued that compulsory membership would be used to impair freedom of expression, the record before the Court did not demonstrate that "the exaction of dues, initiation fees, or assessments" had been "used as a cover for forcing ideological conformity." *Ibid.*

In subsequent cases, this Court, applying the canon of constitutional avoidance, has construed the RLA not to authorize unions to exact fees from an employee to fund political or ideological activities, such as sup-

porting candidates for public office, if the employee objects to paying for such activities. See *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749-750, 768-770 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113, 121-122 (1963); *Ellis* v. *Railway Clerks*, 466 U.S. 435, 447-448 (1984). But it has held that such employees may be required to "pay their fair share of union expenditures 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Air Line Pilots Ass'n* v. *Miller*, 523 U.S. 866, 873 (1998) (quoting *Ellis*, 366 U.S. at 448); see also *Ellis*, 366 U.S. at 448 (holding that employees may be required to defray "the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative").

b. In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), the Court applied that framework to a public employer. *Abood* considered the constitutionality of a Michigan statute authorizing state agencies to enter into collective-bargaining agreements containing "agency shop" provisions, which, rather than requiring all employees to join the union, require objecting employees to pay the union a fee equivalent to union dues. *Id.* at 211. Relying on both the RLA cases and prior decisions "prohibit[ing] a State from compelling any individual to affirm his belief in God, or to associate with a political party, as a condition of retaining public employment," the Court held that a public employee may not be required to subsidize a union's political or ideological activities. *Id.* at 234-236 (citations omitted).

As in the RLA cases, however, the Court made clear in *Abood* that public employees may be required to fund a proportionate share of a union's non-ideological activities, *i.e.*, those relating to "collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225-226. Those assessments, the Court held, are justified in light of the interests that prompt public and private employers alike to sign union-security agreements: the needs to "promote peaceful labor relations" by avoiding "confusion," "rivalries," and "conflicting demands" that would result from multiple agreements with multiple unions, and to prevent non-union workers from "free riding" on the bargaining activities of the union, which has a legal duty fairly to represent all employees, union and non-union, in the relevant unit. *Id.* at 219-221.

In the 36 years since *Abood*, this Court has reaffirmed the decision's dichotomy between a union's collective-bargaining function and its ideological or political activities, while setting out various requirements for the exaction of fees from public employees. See *Locke* v. *Karass*, 555 U.S. 207, 213-214 (2009); *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 301-302 (1986).

2. a. The State of Illinois has established a Medicaid-funded program, called the Rehabilitation Program, to provide in-home services for individuals who otherwise would face institutionalization due to medical impairment. 20 Ill. Comp. Stat. Ann. 2405/3(f); see 42 U.S.C. 1396n(c) (2006 & Supp. V

2011); see also 42 C.F.R. 440.180, 441.300-441.310.[1] Under the program, each patient, or "customer," has a "personal assistant." Although Illinois could have asserted comprehensive control over the relationship between personal assistants and customers—by assigning particular assistants to specific customers, setting times of service, and the like—the State (like other States with similar programs) has instead chosen to structure the Rehabilitation Program so as to tailor the services provided to each customer's particular needs. See Pet. App. 2a.

To achieve that flexibility, Illinois has given the customer control over certain aspects of the employment relationship with the personal assistant, while retaining control over other aspects. The State's Department of Human Services (DHS) sets and pays the personal assistant's wages (while withholding income tax) and establishes the job's basic qualifications and duties. Ill. Admin. Code tit. 89, §§ 686.10, 686.20, 686.40. It also prescribes the terms of employment contracts entered into between personal assistants and customers. *Id.* § 686.10(h). For each customer, a DHS official, in consultation with the customer's physician, prepares an individual service plan setting forth with specificity which tasks the personal assistant will perform. *Id.* §§ 684.10, 684.40, 684.50, 684.75. DHS also mandates an annual performance review by the customer, based on criteria set by DHS, helps the customer conduct that review, and mediates disagreements between the customer and the personal assistant. *Id.* § 686.30. But given the personal na-

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[1] Citations of the Illinois Compiled Statutes Annotated refer to the West 2013 edition or supplement. Citations of the Illinois Administrative Code refer to the 2013 edition.

ture of service provided in one's home, DHS has given the customer control over hiring and firing decisions within the pool of qualified personal assistants, as well as the training, discipline, and day-to-day supervision of the personal assistant. Ill. Admin. Code tit. 89, § 676.30(b).

Illinois has established a similar program, called the Disabilities Program, for mentally disabled individuals. See 405 Ill. Comp. Stat. Ann. 80/2-1 *et seq.*

b. The Illinois Public Labor Relations Act (PLRA) authorizes state employees to join labor organizations and to bargain collectively over the terms and conditions of employment. 5 Ill. Comp. Stat. Ann. 315/6(a). If employees in a particular bargaining unit select a labor organization, that organization serves as the unit's exclusive representative in bargaining over "rates of pay, wages, hours and other conditions of employment" and has a duty to fairly represent all employees in the unit. *Id.* 315/6(c) and (d). The PLRA permits any resulting agreement to contain a "fair share" provision requiring employees who are not members of the union "to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." *Id.* 315/6(e).

In the mid-1980s, personal assistants under the Rehabilitation Program sought to unionize. The Illinois State Labor Relations Board, however, concluded that the PLRA did not apply to personal assistants because Illinois was not their "sole employer"; it did not decide whether the State and the customers have "joint employer status." *Service Emps. Int'l Union,*

No. S-RC-115, 1985 IL LRB LEXIS 165, at *2-*3 (Dec. 19, 1985).

The Illinois General Assembly amended the PLRA in 2003 expressly to cover personal assistants in the Rehabilitation Program. Pub. Act No. 93-204, § 5, 2003 Ill. Laws 1930. The amendments deem personal assistants "[p]ublic employee[s]," 5 Ill. Comp. Stat. Ann. 315/3(n), and designate the State as their "public employer," *id.* 315/3(*o*). As amended, the PLRA requires the State to "engage in collective bargaining with an exclusive representative" of personal assistants "concerning their terms and conditions of employment that are within the State's control." 20 Ill. Comp. Stat. Ann. 2405/3(f); see 5 Ill. Comp. Stat. Ann. 315/7. The amendments disclaim an employment relationship between the State and personal assistants for other purposes. 20 Ill. Comp. Stat. Ann. 2405/3(f).

A majority of the personal assistants under the Rehabilitation Program designated respondent SEIU Healthcare Illinois & Indiana (SEIU-HCII) as their collective-bargaining representative. Pet. App. 4a-5a. The union and Illinois have negotiated a series of collective-bargaining agreements setting pay rates with annual raises, providing state-funded health insurance, designating a committee to develop training programs, prohibiting the union or its members from striking, and establishing a grievance procedure. *Id.* at 5a; see J.A. 35-60 (agreement effective from January 1, 2008, to June 30, 2012). Each agreement has contained a fair-share clause. J.A. 50-51.

c. In 2009, based on an order issued by the Governor permitting Disabilities Program personal assistants to organize, two rival unions petitioned for an election to determine an exclusive representative for

those personal assistants. Pet. App. 5a. A majority voted against such representation. *Ibid.*

3. a. Petitioners are personal assistants who provide in-home services under either the Rehabilitation Program or the Disabilities Program. In 2010, they filed a putative class action in the District Court for the Northern District of Illinois under 42 U.S.C. 1983 against the Governor, SEIU-HCII, and the two unions that had sought to represent the Disabilities Program personal assistants. See Pet. App. 18a-19a, 23a. Their complaint sought an injunction against enforcement of the fair-share fee requirement and a declaration that it violates the First Amendment. J.A. 32-33.

The district court dismissed all claims with prejudice. Pet. App. 20a, 39a. The court explained that the Rehabilitation Program petitioners could lawfully be required to pay fees for collective bargaining and related activities, and that they did not claim that their fees had been used for ideological or political purposes. *Id.* at 27a-36a. It also concluded that the Disabilities Program petitioners' claim was not ripe. *Id.* at 37a-38a.

b. The court of appeals affirmed in part and remanded in part. Pet. App. 1a-17a. Turning first to the Rehabilitation Program, the court explained that if "the personal assistants are * * * State employees[,] * * * this case is controlled by *Abood* and the plaintiffs' claims fail." *Id.* at 9a. Observing that "it is not an uncommon situation for a single individual to find himself with more than one employer for the same job," the court found that Illinois and individual customers are joint employers of personal assistants. *Id.* at 10a-11a. It explained that "the State controls all of the economic aspects of employment: it sets sala-

ries and work hours, pays for training, and pays all wages." *Id.* at 11a. In addition, the court noted, Illinois "sets the qualifications" for personal assistants, "approv[es] a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions," and "annually reviews each personal assistant's performance." *Id.* at 10a-11a. "In light of this extensive control," the court of appeals had "no difficulty concluding that the State employs personal assistants within the meaning of *Abood*." *Id.* at 11a.

The court of appeals affirmed the district court's holding that the Disabilities Program petitioners' claim was unripe, but concluded that the claim should have been dismissed without prejudice. Pet. App. 14a-17a.

SUMMARY OF ARGUMENT

I. The fair-share fee requirement for Rehabilitation Program personal assistants is consistent with the First Amendment.

A. This Court correctly held in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), that the First Amendment permits a public employer to require, as a condition of working for the government, that an employee pay a proportionate share of a union's cost of "collective bargaining, contract administration, and grievance adjustment." *Id.* at 225-226.

1. For over one hundred and fifty years after it was adopted, the First Amendment was not understood to impose any restrictions on the government when it acted as an employer. See *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006). Thus, for example, it was common for government entities to condition employment on membership in a particular political party. Only in the 1950s did this Court first establish lim-

its on the government's authority to take employment actions based on employees' expressive activities. But the Court's decisions since that time have preserved a broad zone of discretion for public employers so long as they do not attempt to "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* at 419.

Under the approach originating in *Pickering* v. *Board of Education of Township High School District 205*, 391 U.S. 563 (1968), a public employer has unfettered authority to make employment decisions based on an employee's speech activities unless the speech relates to a "matter of public concern." If it does, a court evaluating a First Amendment claim must "balance * * * the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

2. The basic dichotomy set forth in *Abood* and subsequent cases parallels the *Pickering* framework. This Court has held that mandatory agency fees represent "a form of compelled speech and association." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012). When an employee is required to subsidize a union's political or ideological activities, the resulting speech and association relate to a matter of public concern, and the government lacks an adequate employment-related justification for that requirement. By contrast, when a government employee is required only to pay a proportionate share of a union's costs incurred in collective bargaining, contract administration, grievance adjustment,

and similar activities, the payment does not relate to a matter of public concern and is a permissible condition of public employment.

Even if a union's bargaining-related activities could properly be characterized as relating to a matter of public concern, the *Abood* dichotomy would readily satisfy the *Pickering* balancing standard. This Court has recognized the government's substantial interests in eliminating the inefficiency that would result if a public employer were required to bargain with more than one union and the potential for objecting employees to "free ride" on the union's legally required efforts on their behalf. On the other side of the balance, a requirement that employees pay their proportionate share of the cost of such activities affects an employee's freedom of speech and association far less than the restrictions at issue in other cases in which this Court has upheld conditions on public employment. An employee remains as free as any other citizen to petition the government for changes to employment policies, to speak out against the union, and to affiliate with anti-union organizations.

3. Although they ask this Court to overrule *Abood*, petitioners have presented no sound reason to disregard *stare decisis*. Their arguments have no support in the original understanding of the First Amendment, lack a principled basis in this Court's established framework for evaluating speech-related conditions on public employment, and risk destabilizing that established framework.

B. Under *Abood*, petitioners' claims fail because the fair-share fees do not fund the union's political or ideological activities. Petitioners contend that *Abood* does not apply here because (i) they do not work on

government property and are not directly supervised by other state employees, and (ii) their salaries are paid from Medicaid funds. Neither of those features of the Rehabilitation Program has anything to do with the basic justifications for the *Abood* rule. Here, it is Illinois that sets and pays the personal assistants' wages, funds their healthcare benefits, and establishes their qualifications and duties. When any of those topics becomes the subject of dispute, it is Illinois, not the individual customers, that will sit down at the bargaining table. It follows that Illinois retains the same constitutionally significant interest in a single bargaining representative as do public employers that manage more typical employment relationships.

II. The Disabilities Program petitioners' claim is not ripe. It is entirely speculative whether they will ever be subject to a collective-bargaining agreement containing a fair-share fee requirement.

ARGUMENT

I. THE FAIR-SHARE FEE REQUIREMENT DOES NOT VIOLATE THE FIRST AMENDMENT

The Rehabilitation Program petitioners contend that the fair-share fee requirement violates their First Amendment rights to petition the government for redress of grievances and freely to choose with whom they will associate. Pet. Br. 13. It is undisputed, however, that the fair-share fees fund only "the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." J.A. 50-51; 5 Ill. Comp. Stat. Ann. 315/6(e). Accordingly, petitioners' claim is foreclosed by *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 232 (1977), and subsequent decisions reaffirming that the First Amendment allows

government entities to enter into collective-bargaining agreements permitting the union to exact a fee from the employees it represents to defray the costs of collective bargaining and related non-ideological activities in which it engages on their behalf. See *Locke* v. *Karass*, 555 U.S. 207, 217-218 (2009); *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 301-302 (1986).

Rather than attempting to reconcile their challenge with this Court's well-settled framework for evaluating claims that particular fees violate the First Amendment, petitioners argue that *Abood* should be either overruled or "limited to its facts." Pet. Br. 18, 24. Neither argument has merit.

A. *Abood* Was Correctly Decided And Should Not Be Overruled

Petitioners argue that this Court should overrule *Abood*'s holding that the First Amendment permits a government entity to provide in a collective-bargaining agreement with a union that an employee is required to pay his or her proportionate share of the costs of "collective bargaining, contract administration, and grievance adjustment," 431 U.S. at 225-226, that the union must conduct on behalf of all covered employees. This Court should decline that request. Petitioners forfeited that argument by failing to raise it in their certiorari petition. See Sup. Ct. R. 14.1; *Yee* v. *City of Escondido*, 503 U.S. 519, 533-538 (1992). For that reason alone, this is not an appropriate case to reconsider *Abood*.

In any event, *Abood* was correctly decided. Overruling it would require this Court not only to discard sixty years of precedent on the specific issue of agency

fees, see *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 236-238 (1956), but also to distort and destabilize the established framework for evaluating claims that a condition of public employment violates the First Amendment, see *Garcetti* v. *Ceballos*, 547 U.S. 410, 417-420 (2006). Petitioners have pointed to nothing in the original understanding of the First Amendment, *Abood*'s practical consequences, or any other relevant *stare decisis* consideration that justifies so radically reshaping First Amendment law.

1. For over a century and a half after the First Amendment was adopted, and nearly a century after ratification of the Fourteenth Amendment, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Garcetti*, 547 U.S. at 417 (quoting *Connick* v. *Myers*, 461 U.S. 138, 143 (1983)). The First Amendment was understood to apply only when the government acted as sovereign with respect to citizens, not when it acted as employer with respect to employees. As Justice Holmes famously put it, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). "For many years, Holmes' epigram expressed this Court's law." *Connick*, 461 U.S. at 144 (citing decisions between 1882 and 1952).

That original understanding of the First Amendment permitted public entities to make employment decisions based not only on what a person said, but also on what associations the person maintained. For example, the requirement that an employee be a member of a particular political party "was, without

any thought that it could be unconstitutional, a basis for government employment from the earliest days of the Republic." *Rutan* v. *Republican Party*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting); see *id.* at 83 (Stevens, J., concurring). As the D.C. Circuit explained in 1950, "the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations." *Bailey* v. *Richardson*, 182 F.2d 46, 59, aff'd by an equally divided Court, 341 U.S. 918 (1951).

This Court first departed from that understanding of the First Amendment "in the 1950's and early 1960's," in cases involving requirements that "public employees * * * swear oaths of loyalty to the State and reveal the groups with which they associated." *Connick*, 461 U.S. at 144; see *ibid.* (citing cases). The Court did so to address the concern that the government could "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419.

The Court therefore has distinguished between conditions on public employment reflecting legitimate concerns of the sort ordinarily held by private employers and those that exploit the employment relationship to curtail the exercise of public employees' constitutional rights as private citizens. In drawing that line, the Court has emphasized that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418.

To address that imperative, this Court employs the two-step approach originating in *Pickering* v. *Board of Education of Township High School District 205*, 391 U.S. 563 (1968), "in analyzing a claim that a public employee was deprived of First Amendment rights by her employer." *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 599-600 (2008). First, if the speech activity does not relate to "a matter of public concern," "the employee has no First Amendment cause of action." *Garcetti*, 547 U.S. at 418. Second, even if the speech relates to a matter of public concern, the employee's claim fails if "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Ibid.* At that step, a court must not impose "an unduly onerous burden on the State," *Connick*, 461 U.S. at 149, but rather must "balance * * * the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568. That balancing is necessary because "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Engquist*, 553 U.S. at 598 (citation omitted).

The Court has held that the two-step approach applies not only to Speech Clause claims, but also to alleged violations of the freedom of expressive association, at least where the association is "intermixed" with the employee's speech activities. *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 715, 719-

720 (1996); see also *id.* at 719 (further explaining that "the inquiry is whether the affiliation requirement is a reasonable one"). It has also held that approach applicable to claims under the Petition Clause, *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488, 2500 (2011), with two Members of the Court expressing the view that the Petition Clause does not apply at all to "petitions [that] are addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign," *id.* at 2501-2502 (Thomas, J., concurring in the judgment) (citation omitted); *id.* at 2506 (Scalia, J., concurring in the judgment in part and dissenting in part).

2. Because this Court's public-sector agency-fee cases grew out of decisions addressing First Amendment limits on private-sector union-security agreements, see pp. 3-4, *supra*, they developed somewhat independently of the cases addressing public-employment conditions more generally.[2] But as petitioners recognize (Br. 28-31), they address the same fundamental First Amendment question: the authority of the government to adopt measures affecting associational and expressive activities "as a condition of retaining public employment," not in its sovereign capacity. *Abood*, 431 U.S. at 234-235 (relying on employment-condition cases); see *Board of County*

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[2] As the United States explained in *Communications Workers of America* v. *Beck*, 487 U.S. 735 (1988), it is unclear why *Hanson* and the other RLA cases, which concerned only federal preemption of state laws barring *private* union-shop agreements, raised a First Amendment question at all. See U.S. Amicus Br. at 27-29, (No. 86-637). But to the extent the First Amendment applies, judicial review of an employer-imposed condition on private employment should be at least as deferential as review of a condition on public employment.

Comm'rs v. *Umbehr*, 518 U.S. 668, 674-675 (1996) (situating *Abood* within broader context of restrictions on government employees' speech activities); *Lehnert*, 500 U.S. at 517 (same); see also *Keller* v. *State Bar of Calif.*, 496 U.S. 1, 10 (1990). And the union-fee holdings embody the same core principle that "although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context." *Engquist*, 553 U.S. at 600.

a. This Court has held that mandatory agency fees represent "a form of compelled speech and association." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012).[3] But unlike laws requiring citizens to express an ideological message under threat of penalty, see *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977), compelling private expressive associations to include an unwanted person, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 645, 659 (2000), or imposing assessments on private companies primarily for use in generic advertising to the public, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 408 (2001), agency fees are merely a prerequisite to voluntary employment with a particular government entity and are assessed to cover the costs of representing the employees in their employment relationship with that entity. This Court has never subjected employment condi-

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[3] Petitioners appear to contend (Br. 30, 37) that the PLRA's requirement that Illinois bargain only with the personal assistants' chosen representative constitutes an additional First Amendment injury. Petitioners' complaint did not seek to enjoin that requirement, see J.A. 32-33, and that argument is in any event foreclosed by *Minnesota Board for Community Colleges* v. *Knight*, 465 U.S. 271, 278-279, 282-283, 288 (1984).

tions to the same exacting scrutiny as free-standing legal obligations, but rather has accorded "a wide degree of deference to the employer's judgment." *Connick*, 461 U.S. at 151-152.

Abood's distinction between a union's ideological and non-ideological activities parallels *Pickering*'s distinction between matters of public and private concern. When an employee is required to contribute financially to a union's political or ideological activities, the resulting speech and association relate to a "matter of public concern" and therefore require a court to "balance the First Amendment interest of the employee against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Guarnieri*, 131 S. Ct. at 2493 (internal quotation marks and citation omitted). *Abood* teaches that a government employer lacks an adequate employment-related justification for requiring an employee "to contribute to the support of an ideological cause he may oppose as a condition of holding a job." *Abood*, 431 U.S. at 235.

That conclusion is sound. A union's ideological and political activities, such as supporting a candidate for public office, do not advance the efficient operation of a government employer. And the employee's First Amendment interest is especially significant in the context of compelled subsidies for political or ideological activities, because, "unlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views." *Lehnert*, 500 U.S. at 521 (opinion of Blackmun, J.). For those reasons, "the constitutional principles that prevent a State from conditioning pub-

lic employment upon association with a political party, or upon professed religious allegiance, similarly prohibit a public employer from requiring [an employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job." *Id.* at 517 (majority opinion) (internal quotation marks and citation omitted); see *Abood*, 431 U.S. at 235. It follows that the procedural mechanisms that employers and unions establish to ensure that objecting employees are not required to subsidize ideological speech must be "carefully tailored to minimize the infringement of free speech rights." *Knox*, 132 S. Ct. at 2291 (quoting *Hudson*, 475 U.S. at 303).

By contrast, when employees are required only to pay a proportionate share of a union's costs incurred in collective bargaining, contract administration, grievance adjustment, and comparable activities on their behalf, the resulting association with the union and financial support of the union's activities do not relate to a matter of public concern as that concept has been understood in this Court's cases. This Court has made clear that "speech on merely private employment matters is unprotected," *Umbehr*, 518 U.S. at 675, including matters such as "the need for a grievance committee" and "office transfer policy," *Connick*, 461 U.S. at 141. That conclusion reflects the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143. Like "[a] petition filed with an employer using an internal grievance procedure," negotiations between the employees' chosen representative and their government employer over the terms and conditions of employment do "not seek to communicate to the public or to

advance a political or social point of view beyond the employment context." *Guarnieri*, 131 S. Ct. at 2501.

Of course, government decisions about the terms and conditions of public employment can in turn have "powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. But such potential consequences do not render issues between a government employer and an employee (or the employees' union) matters of public concern as contemplated in the *Pickering* line of cases. Matters of public concern are generally topics concerning "the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1964), for which "free and open debate is vital to informed decision-making by the electorate," *Pickering*, 391 U.S. at 571–572. Negotiations and other interactions *within* the employment relationship concerning basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations," typically do not meet that standard. *Guarnieri*, 131 S. Ct. at 2496.

Accordingly, all employees whom the union has a duty to represent fairly in performing those tasks can be required to pay the costs incurred by the union on their behalf. Insofar as there may be a broader political debate over the consequences of the bargaining, the employees remain free to participate as citizens in that public discussion. See pp. 24-25, *infra*.

b. Even if a union's bargaining-related activities could properly be deemed to relate to matters of public concern, the line drawn in *Abood* would readily satisfy *Pickering*'s balancing standard. This Court has explained that government entities have a "vital" interest in the two justifications identified in *Abood*: "labor peace and avoiding 'free riders.'" *Lehnert*, 500

U.S. at 519. Those interests supply "an adequate justification," *Garcetti*, 547 U.S. at 418, for allowing a union charged with a duty fairly to represent all public employees in the relevant unit to assess a fee on those employees to support collective bargaining and related non-ideological activities undertaken on their behalf.

i. Government employers, like their private counterparts, have a critical interest in bargaining with a single employee representative. As *Abood* explained in the context of public teachers, "confusion and conflict * * * could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Abood*, 431 U.S. at 224. Providing a mechanism for employees to speak with one voice at the bargaining table can therefore be important to a government entity's "effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, and an employer can thereby secure provisions that favor management (*e.g.*, the no-strike clause in the agreement here) and improve the quality and reliability of employee performance. That mechanism can also assure employees that their interests will be forcefully represented, improving workforce morale and making a government job more attractive to the most talented citizens.

Those governmental objectives cannot be achieved, however, unless the union is required to represent the interests of the entire bargaining unit, and therefore to enter into agreements that benefit all employees. See 5 Ill. Comp. Stat. Ann. 315/6(d). And because the union has that state-imposed duty, non-members could

free ride on the union's efforts to secure better terms of employment if they were not required to defray a proportionate share of its costs. The governmental interest at issue is thus not merely the equitable principle "that individuals who may benefit from [a union's] representation should pay for its costs." Pet Br. 34. "What is distinctive * * * about the 'free riders' who are non-union members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). That differs from circumstances in which the representative has no legal duty to represent objectors. See *Knox*, 132 S. Ct. at 2289-2290 (citing examples of such groups provided by law review article).

ii. On the other side of the *Pickering* balance, employees' First Amendment interest in not contributing financially to a union's efforts to secure better employment terms on their behalf is far less substantial than the interests at stake in other contexts where this Court has approved restrictions on public employees' expressive activities. See, *e.g.*, *Guarnieri*, 131 S. Ct. at 2492, 2501 (permitting adverse action against employee for filing of grievance challenging change in duties). Payment by employees of their fair share of such expenses does not prohibit them from saying anything they want, including "petition[ing] their neighbors and government in opposition to the union which represents them in the workplace." *Lehnert*, 500 U.S. at 521. This is thus not a situation in which "the community would be deprived of in-

formed opinions on important public issues" if the employment condition is enforced. *City of San Diego* v. *Roe*, 543 U.S. 77, 82 (2004) (per curiam). Although within the employment relationship the public employer may choose to bargain only with the union, individuals with differing views "have no constitutional right to force the government to listen to their views." *Minnesota Bd. for Community Colleges* v. *Knight*, 465 U.S. 271, 283 (1984).

Nor do agency fees substantially burden an employee's freedom of expressive association. The employee remains free to affiliate with others opposed to the union, as this suit demonstrates. "Surely no one would question the absolute right of the nonunion [personal assistants] to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media." *City of Madison, Joint Sch. Dist. No. 8* v. *Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 176 n.10 (1976).

In short, given the long-recognized "vital policy interest[s]" of public employers in requiring all employees who benefit from bargaining to defray its costs, *Lehnert*, 500 U.S. at 519, and the comparatively modest effect on employees' expressive freedom, *Abood* correctly held that fees for non-ideological union activities are permissible under the First Amendment.

3. Petitioners seek to overrule a longstanding First Amendment doctrine this Court has reaffirmed on multiple occasions, but they have presented no sound reason to overcome *stare decisis* in this context. Although that doctrine is not an "inexorable command," this Court has recognized that precedents—

including those involving constitutional questions—should not be overturned absent "some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks and citations omitted).

No such justification exists here. For the reasons discussed above, petitioners' proposed rule finds no support in the understanding of the First Amendment that prevailed for the first one hundred and sixty years of the Nation's history. It would also represent a striking doctrinal anomaly in light of this Court's more recent cases addressing conditions on government employment, which have appropriately afforded public employers broad discretion. Numerous public agencies, moreover, have structured their employment relations and contractual obligations on the understanding that union-security agreements are lawful. As this Court has explained, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights," *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) (citation omitted), a concern that should be accorded particular respect when sovereign States are involved.

Petitioners do not argue that factual assumptions undergirding *Abood*'s holding have been undermined by subsequent developments, or that *Abood* has proved unworkable. Instead, petitioners rest their argument for overruling *Abood* on the proposition that the same standard of review applicable to mandatory regulatory impositions—in which the State acts in its sovereign capacity—should apply to conditions on employment. See Pet. Br. 16-18. But that contention ignores the "crucial difference * * * between the government exercising the power to regulate or

license, as lawmaker, and the government acting as proprietor, to manage [its] internal operation," a "distinction [that] has been particularly clear in [this Court's] review of state action in the context of public employment." *Engquist*, 553 U.S. at 598 (internal quotation marks and citations omitted; first pair of brackets in original). Indeed, petitioners' approach would call this established analytical framework into question. And if, as petitioners assert, a union acting as an exclusive representative in collective bargaining is treated like a fully expressive association independently petitioning the government—ignoring both the government's distinct interests as employer and the predominantly economic and contractual nature of the relationship—it is unclear whether the government could constitutionally impose a duty of fair representation on the union, regulate union elections, or impose other forms of regulation that have long been considered lawful.

Petitioners criticize *Abood*'s "rhetorical move" of building on what they perceive as solely a Commerce Clause analysis in *Hanson* for First Amendment purposes. See Pet. Br. 14-15. That is not a fair reading of this Court's precedents. *Hanson* unequivocally rejected a facial First Amendment challenge to a union-security agreement, see pp. 3-4, *supra*, and the subsequent RLA cases would be incoherent as constitutional-avoidance decisions if the statutory construction they adopted were unconstitutional. Petitioners place considerable weight (Pet. Br. 21-23, 39-40) on Justice Powell's separate opinion in *Abood*. But aside from the fact that that opinion did not represent the reasoning of the Court, petitioners omit any mention of Justice Powell's conclusion that, with respect to is-

sues like "salaries and pension benefits" and "[t]he processing of individual grievances," "the case for requiring the [employees] to speak through a single representative would be quite strong, while the concomitant limitation of First Amendment rights would be relatively insignificant." 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment).

B. Because Petitioners Are State Employees, Illinois May Require Them To Defray Their Proportionate Share Of The Union's Costs Of Collective Bargaining And Related Non-Ideological Activities Undertaken On Their Behalf

The court of appeals correctly concluded that because the Rehabilitation Program personal assistants are jointly employed by Illinois and individual customers, the fair-share fee requirement does not violate the First Amendment. See Pet. App. 10a-11a. Petitioners do not argue that a joint-employment relationship cannot satisfy *Abood*, nor would that proposition make sense where, as here, a public employer controls numerous essential terms of employment that might be the subject of bargaining. Instead, petitioners argue that certain characteristics of the Rehabilitation Program render *Abood*'s justifications for agency fees inapplicable. That argument is unfounded.

1. As discussed above, *Abood* rests on the more deferential First Amendment standards applicable when the government acts as an employer rather than as a sovereign, as well as the vital interests of public entities in managing their workforces. The threshold inquiry here under *Abood*, therefore, is whether Illinois is acting as an employer.

Petitioners are correct (Pet. Br. 32) that in determining whether the government is acting as an em-

ployer for these purposes, a court should examine whether the relationship between the public entity and the personnel implicates the governmental interests that justify agency fees. But because the First Amendment has always been understood to impose far less stringent limitations on a government entity acting as an employer, it is also sensible to consult our legal tradition's understanding of what constitutes an employment relationship, an understanding that is expressed in the common law of agency. Under any reasonable application of either of those metrics, Illinois is the personal assistants' employer.

Illinois satisfies the majority of the traditional indicia of an employer, which this Court set out in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751-752 & nn.18-31 (1989) (*CCNV*). Illinois establishes and pays personal assistants' wages and funds their health insurance, and it withholds taxes, consistent with the federal requirement that "every employer making payment of wages shall deduct and withhold upon such wages" appropriate federal taxes, 26 U.S.C. 3402(a)(1); see Ill. Admin. Code tit. 89, §§ 676.200, 684.50, 686.10(h)(1), 686.20, 686.40. It sets the qualifications for the job and prescribes the terms of the contracts between customers and personal assistants. *Id.* § 686.10. Illinois not only establishes the duties of personal assistants generally, but it delineates for each personal assistant "the specific tasks" to be performed, "the frequency with which the specific tasks are to be provided," and "the number of hours each task is to be provided per month." *Id.* § 684.50; see *id.* §§ 684.10, 686.20. It also manages the employee-grievance process, outlines the criteria for annual performance reviews, and pays for training programs.

Id. §§ 684.50, 686.30; J.A. 47, 51-54. As the court of appeals concluded, Illinois exercises "extensive control" over personal assistants. Pet. App. 11a.

That pervasive control is relevant not only because it shows that Illinois fulfills the traditional role of an employer, but because the employment terms within its control are the very issues that would be the subject of bargaining. If a personal assistant wants an increase in pay, more benefits, fewer duties, or a different grievance process, he or she could not ask an individual customer for those changes. Rather, it is Illinois that would sit down at the bargaining table, and the State therefore retains the same constitutionally significant interest in negotiating with a single agent as public entities in more typical employment relationships. In the particular context of *Abood*, therefore, it would make little sense to deem Illinois, which controls so many essential terms of employment, not to be the personal assistants' employer.

It is true that in light of the personalized nature of the services provided under the Rehabilitation Program, Illinois has permitted individual customers to perform functions that are also traditional powers of an employer. Most significantly, customers select the personal assistants to whom they will entrust their care and direct the personal assistants' day-to-day activities, albeit within the detailed framework established by the state-approved service plan. See Ill. Admin. Code tit. 89, § 676.30(b). For that reason, Illinois and the customers are properly classified as joint employers, a well-established status that applies in a variety of legal contexts. See Pet. App. 9a-11a; see, *e.g.*, *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468 (3d Cir. 2012). But

the sorts of individualized issues within the customers' control are far less likely to be the subject of bargaining—and therefore to implicate the basic rationale of *Abood*—than issues like compensation, benefits, employment duties, contract terms, and the grievance process.

Petitioners place substantial emphasis on the fact that certain provisions of Illinois law deem the customer a personal assistant's employer. See Pet. Br. 6-7, 44-45. Of course, state-law classifications could not control whether Illinois is acting as an employer for First Amendment purposes. Cf. *O'Hare Truck Serv.*, 518 U.S. at 721-722. And in any case, the relevant provisions explain only that the customer is "responsible for controlling all aspects of the employment relationship *between the customer and the* [*personal assistant*]," Ill. Admin. Code tit. 89, § 676.30(b) (emphasis added). Illinois law makes equally clear that there are "terms and conditions of employment that are within the State's control." 20 Ill. Comp. Stat. Ann. 2405/3(f). Those terms and conditions include most of what are traditionally thought of as fundamental employment issues: compensation, qualifications, and job duties. Given that, no basis exists to hold *Abood* inapplicable here.

2. Petitioners argue (Br. 24-26, 39-40) that personal assistants are not public employees because they are not supervised directly by other state employees while on the job and do not work on government property. Although those features are factors in the traditional standard for an employment relationship, here they must be considered in light of the numerous core terms and conditions of employment that Illinois controls. More significantly, those features bear very lit-

tle relation to the central First Amendment justifications for requiring government employees to contribute their fair share toward the cost of a union's efforts on their behalf to secure favorable terms and conditions of employment. Like many other employers, including private-sector home-care providers, see, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 164 (2007), Illinois's "vital policy interest" in bargaining with an exclusive representative over wages, hours, and duties is not diminished because employees work off-site or are supervised by private customers. *Lehnert*, 500 U.S. at 519. It would be arbitrary to categorically exclude from the *Abood* framework all employees who work alone in the field, rather than on government property. Indeed, this Court first developed the pertinent First Amendment principles in the railroad industry, where employees like engineers and trainmen have no centralized workplace.

Petitioners also argue (Br. 39, 51-55) that personal assistants are situated similarly to persons who merely receive government funds or contract with the government. But because of the "extensive control" that Illinois exerts over all aspects of their work—wages, job qualifications, terms of employment, services provided—petitioners are very differently positioned than mere recipients of government funding. Pet. App. 11a. For example, physicians accept reimbursement from Medicare or Medicaid for particular services rendered (Pet. Br. 52-53), just as they do from private insurance companies. But the government does not set or pay their overall wages, fund their healthcare benefits, establish their job qualifications, manage a grievance process, develop their training

regimens, or specify what services they may provide to a patient. All those features are present here.

3. Petitioners argue (Br. 40) that bargaining over the terms and conditions of employment in a Medicaid-funded program relates to a "matter of public concern," presumably in a way that bargaining over the terms and conditions of other public employment does not. But petitioners fail to acknowledge that even if the speech component of contract formation and implementation in the collective-bargaining context relates to a matter of public concern, that would mean only that the public employer must have an "adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. As discussed, Illinois has such an "adequate justification" here. See pp. 22-24, *supra*.

In any event, there is nothing distinctive for these purposes about the fact that personal assistants are paid from funds appropriated for an entitlement program. The citizenry always has a critical interest in how public funds are spent, and how recipients carry out their public duties, regardless of how the funds are earmarked. But if that were sufficient to subject the ordinary give-and-take of employment negotiations to heightened First Amendment scrutiny, it would completely "transform everyday employment disputes into matters for constitutional litigation in the federal courts." *Guarnieri*, 131 S. Ct. at 2501.

Petitioners appear to believe (Br. 40) that because "[i]nterest groups representing medical practitioners"—many of whom are indisputably not public employees—"often lobby government over Medicaid programs," any person paid out of the Medicaid budg-

et cannot be a state employee for First Amendment purposes. That argument is misguided. It is true that the state legislature ultimately controls the organs of state government operating in any capacity—not only as a regulators, but also as employers, contractors, and grant distributors—and therefore that any objection to a public entity's decisions could be the subject of legislative lobbying. But in *Pickering*, *Abood*, *Garcetti*, and numerous other cases, this Court has confirmed a constitutionally significant distinction, rooted in the original understanding of the First Amendment, between the government acting as a sovereign and the government acting as an employer. It would nullify that distinction to hold that the mere fact that "private employment matters" could be changed by the state legislature makes any expressive activity about those matters—even ordinary contract negotiation and performance—the First Amendment equivalent of lobbying. *Umbehr*, 518 U.S. at 675.

Finally, petitioners repeatedly intimate (Br. 6, 38) that Illinois law interferes in familial relationships by requiring an individual who wishes to care for a relative to pay fees to the union. Although a person who meets the job qualifications for a personal assistant could be hired by a relative, the program is not in any way limited to care by family members. And in any event, a person is required to pay fair-share fees only if he or she wishes to receive the wages and healthcare benefits that Illinois has offered to provide—*i.e.*, to be a state employee.

II. THE DISABILITIES PROGRAM PETITIONERS' CLAIM IS NOT RIPE

The Disabilities Program personal assistants voted against union representation, and no collective-bargaining agreement governs their employment. Pet. App. 5a. They therefore are not subject to a fair-share fee requirement. Petitioners nevertheless seek to enjoin the State from enforcing any fair-share fee requirement that might someday be included in a collective-bargaining agreement under the Disabilities Program. J.A. 32.

That claim is "not ripe for adjudication" because "it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)). The Disabilities Program petitioners will suffer their claimed injury only if (i) Disabilities Program personal assistants decide to select a collective-bargaining representative; (ii) the representative enters into a collective-bargaining agreement with the State; and (iii) that agreement contains a fair-share fee requirement. "Under these circumstances, where ['this Court has] no idea whether or when'" these events will transpire, "the issue is not fit for adjudication." *Ibid.* (quoting *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U.S. 158, 163 (1967)). Moreover, postponing judicial consideration will not impose a hardship on petitioners because they are not required to engage in or to refrain from any conduct in the meantime. See *id.* at 301-302.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. Const. Amend. XIV provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way

abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. 42 U.S.C. 1396n(c) (2006 & Supp. V 2011) provides:

Compliance with State plan and payment provisions

* * * * *

(c) Waiver respecting medical assistance requirement in State plan; scope, etc.; "habilitation services" defined; imposition of certain regulatory limits prohibited; computation of expenditures for certain disabled patients; coordinated services; substitution of participants

(1) The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan. For purposes of this subsection, the term "room and board" shall not include an amount established under a method determined by the State to reflect the portion of costs of rent and food attributable to an unrelated personal caregiver who is residing in the same household with an individual who, but for the assistance of such caregiver, would require admission to a hospital, nursing facility, or intermediate care facility for the mentally retarded.

(2) A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that—

(A) necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services under the waiver and to assure financial accountability for funds expended with respect to such services;

(B) the State will provide, with respect to individuals who—

(i) are entitled to medical assistance for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded under the State plan,

(ii) may require such services, and

(iii) may be eligible for such home or community-based care under such waiver,

for an evaluation of the need for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded;

(C) such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services,

or services in an intermediate care facility for the mentally retarded;

(D) under such waiver the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals does not exceed 100 percent of the average per capita expenditure that the State reasonably estimates would have been made in that fiscal year for expenditures under the State plan for such individuals if the waiver had not been granted; and

(E) the State will provide to the Secretary annually, consistent with a data collection plan designed by the Secretary, information on the impact of the waiver granted under this subsection on the type and amount of medical assistance provided under the State plan and on the health and welfare of recipients.

(3) A waiver granted under this subsection may include a waiver of the requirements of section 1396a(a)(1) of this title (relating to statewideness), section 1396a(a)(10)(B) of this title (relating to comparability), and section 1396a(a)(10)(C)(i)(III) of this title (relating to income and resource rules applicable in the community). A waiver under this subsection (other than a waiver described in subsection (h)(2)) shall be for an initial term of three years and, upon the request of a State, shall be extended for additional five-year periods unless the Secretary determines that for the previous waiver period the assurances provided under paragraph (2) have not been met. A waiver may pro-

vide, with respect to post-eligibility treatment of income of all individuals receiving services under that waiver, that the maximum amount of the individual's income which may be disregarded for any month for the maintenance needs of the individual may be an amount greater than the maximum allowed for that purpose under regulations in effect on July 1, 1985.

(4) A waiver granted under this subsection may, consistent with paragraph (2)—

(A) limit the individuals provided benefits under such waiver to individuals with respect to whom the State has determined that there is a reasonable expectation that the amount of medical assistance provided with respect to the individual under such waiver will not exceed the amount of such medical assistance provided for such individual if the waiver did not apply, and

(B) provide medical assistance to individuals (to the extent consistent with written plans of care, which are subject to the approval of the State) for case management services, homemaker/home health aide services and personal care services, adult day health services, habilitation services, respite care, and such other services requested by the State as the Secretary may approve and for day treatment or other partial hospitalization services, psychosocial rehabilitation services, and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness.

Except as provided under paragraph (2)(D), the Secretary may not restrict the number of hours or days of

respite care in any period which a State may provide under a waiver under this subsection.

(5) For purposes of paragraph (4)(B), the term "habilitation services"—

(A) means services designed to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community based settings; and

(B) includes (except as provided in subparagraph (C)) prevocational, educational, and supported employment services; but

(C) does not include—

(i) special education and related services (as such terms are defined in section 1401 of title 20), which otherwise are available to the individual through a local educational agency; and

(ii) vocational rehabilitation services which otherwise are available to the individual through a program funded under section 730 of title 29.

(6) The Secretary may not require, as a condition of approval of a waiver under this section under paragraph (2)(D), that the actual total expenditures for home and community-based services under the waiver (and a claim for Federal financial participation in expenditures for the services) cannot exceed the approved estimates for these services. The Secretary may not deny Federal financial payment with respect to services under such a waiver on the ground that, in

order to comply with paragraph (2)(D), a State has failed to comply with such a requirement.

(7)(A) In making estimates under paragraph (2)(D) in the case of a waiver that applies only to individuals with a particular illness or condition who are inpatients in, or who would require the level of care provided in, hospitals, nursing facilities, or intermediate care facilities for the mentally retarded, the State may determine the average per capita expenditure that would have been made in a fiscal year for those individuals under the State plan separately from the expenditures for other individuals who are inpatients in, or who would require the level of care provided in, those respective facilities.

(B) In making estimates under paragraph (2)(D) in the case of a waiver that applies only to individuals with developmental disabilities who are inpatients in a nursing facility and whom the State has determined, on the basis of an evaluation under paragraph (2)(B), to need the level of services provided by an intermediate care facility for the mentally retarded, the State may determine the average per capita expenditures that would have been made in a fiscal year for those individuals under the State plan on the basis of the average per capita expenditures under the State plan for services to individuals who are inpatients in an intermediate care facility for the mentally retarded, without regard to the availability of beds for such inpatients.

(C) In making estimates under paragraph (2)(D) in the case of a waiver to the extent that it applies to

individuals with mental retardation or a related condition who are resident in an intermediate care facility for the mentally retarded the participation of which under the State plan is terminated, the State may determine the average per capita expenditures that would have been made in a fiscal year for those individuals without regard to any such termination.

(8) The State agency administering the plan under this subchapter may, whenever appropriate, enter into cooperative arrangements with the State agency responsible for administering the program for children with special health care needs under subchapter V of this chapter in order to assure improved access to coordinated services to meet the needs of such children.

(9) In the case of any waiver under this subsection which contains a limit on the number of individuals who shall receive home or community-based services, the State may substitute additional individuals to receive such services to replace any individuals who die or become ineligible for services under the State plan.

(10) The Secretary shall not limit to fewer than 200 the number of individuals in the State who may receive home and community-based services under a waiver under this subsection.

4. 5 Ill. Comp. Stat. 315/3 (West 2013) provides in pertinent part:

Definitions

§ 3. Definitions. As used in this Act, unless the context otherwise requires:

(a) "Board" means the Illinois Labor Relations Board or, with respect to a matter over which the jurisdiction of the Board is assigned to the State Panel or the Local Panel under Section 5, the panel having jurisdiction over the matter.

(b) "Collective bargaining" means bargaining over terms and conditions of employment, including hours, wages, and other conditions of employment, as detailed in Section 7 and which are not excluded by Section 4.

* * * * *

(f) "Exclusive representative", except with respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers, and peace officers in the Department of State Police, means the labor organization that has been (i) designated by the Board as the representative of a majority of public employees in an appropriate bargaining unit in accordance with the procedures contained in this Act, (ii) historically recognized by the State of Illinois or any political subdivision of the State before July 1, 1984 (the effective date of this Act) as the exclusive representative of the employees in an appropriate bargaining unit, (iii) after July 1, 1984 (the effective date of this Act) recognized by an employer upon evidence, acceptable to the

Board, that the labor organization has been designated as the exclusive representative by a majority of the employees in an appropriate bargaining unit; (iv) recognized as the exclusive representative of personal care attendants or personal assistants under Executive Order 2003-8 prior to the effective date of this amendatory Act of the 93rd General Assembly, and the organization shall be considered to be the exclusive representative of the personal care attendants or personal assistants as defined in this Section; or (v) recognized as the exclusive representative of child and day care home providers, including licensed and license exempt providers, pursuant to an election held under Executive Order 2005-1 prior to the effective date of this amendatory Act of the 94th General Assembly, and the organization shall be considered to be the exclusive representative of the child and day care home providers as defined in this Section.

With respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers, and peace officers in the Department of State Police, "exclusive representative" means the labor organization that has been (i) designated by the Board as the representative of a majority of peace officers or fire fighters in an appropriate bargaining unit in accordance with the procedures contained in this Act, (ii) historically recognized by the State of Illinois or any political subdivision of the State before January 1, 1986 (the effective date of this amendatory Act of 1985) as the exclusive representative by a majority of the peace officers or fire fighters in an appropriate bargaining unit, or (iii)

after January 1, 1986 (the effective date of this amendatory Act of 1985) recognized by an employer upon evidence, acceptable to the Board, that the labor organization has been designated as the exclusive representative by a majority of the peace officers or fire fighters in an appropriate bargaining unit.

Where a historical pattern of representation exists for the workers of a water system that was owned by a public utility, as defined in Section 3-105 of the Public Utilities Act, prior to becoming certified employees of a municipality or municipalities once the municipality or municipalities have acquired the water system as authorized in Section 11-124-5 of the Illinois Municipal Code, the Board shall find the labor organization that has historically represented the workers to be the exclusive representative under this Act, and shall find the unit represented by the exclusive representative to be the appropriate unit.

(g) "Fair share agreement" means an agreement between the employer and an employee organization under which all or any of the employees in a collective bargaining unit are required to pay their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and other conditions of employment, but not to exceed the amount of dues uniformly required of members. The amount certified by the exclusive representative shall not include any fees for contributions related to the election or support of any candidate for political office. Nothing in this subsection (g) shall preclude an employee from making vol-

untary political contributions in conjunction with his or her fair share payment.

* * * * *

(n) "Public employee" or "employee", for the purposes of this Act, means any individual employed by a public employer, including (i) interns and residents at public hospitals, (ii) as of the effective date of this amendatory Act of the 93rd General Assembly, but not before, personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act,[1] subject to the limitations set forth in this Act and in the Disabled Persons Rehabilitation Act, (iii) as of the effective date of this amendatory Act of the 94th General Assembly, but not before, child and day care home providers participating in the child care assistance program under Section 9A-11 of the Illinois Public Aid Code, subject to the limitations set forth in this Act and in Section 9A-11 of the Illinois Public Aid Code, (iv) as of January 29, 2013 (the effective date of Public Act 97-1158), but not before except as otherwise provided in this subsection (n), home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, no matter whether the State provides those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise, (v) beginning on the effective date of this amendatory Act of the 98th General Assembly and not-

withstanding any other provision of this Act, any person employed by a public employer and who is classified as or who holds the employment title of Chief Stationary Engineer, Assistant Chief Stationary Engineer, Sewage Plant Operator, Water Plant Operator, Stationary Engineer, Plant Operating Engineer, and any other employee who holds the position of: Civil Engineer V, Civil Engineer VI, Civil Engineer VII, Technical Manager I, Technical Manager II, Technical Manager III, Technical Manager IV, Technical Manager V, Technical Manager VI, Realty Specialist III, Realty Specialist IV, Realty Specialist V, Technical Advisor I, Technical Advisor II, Technical Advisor III, Technical Advisor IV, or Technical Advisor V employed by the Department of Transportation who is in a position which is certified in a bargaining unit on or before the effective date of this amendatory Act of the 98th General Assembly, and (vi) beginning on the effective date of this amendatory Act of the 98th General Assembly and notwithstanding any other provision of this Act, any mental health administrator in the Department of Corrections who is classified as or who holds the position of Public Service Administrator (Option 8K), any employee of the Office of the Inspector General in the Department of Human Services who is classified as or who holds the position of Public Service Administrator (Option 7), any Deputy of Intelligence in the Department of Corrections who is classified as or who holds the position of Public Service Administrator (Option 7), and any employee of the Department of State Police who handles issues concerning the Illinois State Police Sex Offender Registry

and who is classified as or holds the position of Public Service Administrator (Option 7), but excluding all of the following: employees of the General Assembly of the State of Illinois; elected officials; executive heads of a department; members of boards or commissions; the Executive Inspectors General; any special Executive Inspectors General; employees of each Office of an Executive Inspector General; commissioners and employees of the Executive Ethics Commission; the Auditor General's Inspector General; employees of the Office of the Auditor General's Inspector General; the Legislative Inspector General; any special Legislative Inspectors General; employees of the Office of the Legislative Inspector General; commissioners and employees of the Legislative Ethics Commission; employees of any agency, board or commission created by this Act; employees appointed to State positions of a temporary or emergency nature; all employees of school districts and higher education institutions except firefighters and peace officers employed by a state university and except peace officers employed by a school district in its own police department in existence on the effective date of this amendatory Act of the 96th General Assembly; managerial employees; short-term employees; legislative liaisons; a person who is a State employee under the jurisdiction of the Office of the Attorney General who is licensed to practice law or whose position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation; a person who is a State employee under the jurisdiction of

the Office of the Comptroller who holds the position of Public Service Administrator or whose position is otherwise exempt under the Comptroller Merit Employment Code; a person who is a State employee under the jurisdiction of the Secretary of State who holds the position classification of Executive I or higher, whose position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation, or who is otherwise exempt under the Secretary of State Merit Employment Code; employees in the Office of the Secretary of State who are completely exempt from jurisdiction B of the Secretary of State Merit Employment Code and who are in Rutan-exempt positions on or after April 5, 2013 (the effective date of Public Act 97-1172); a person who is a State employee under the jurisdiction of the Treasurer who holds a position that is exempt from the State Treasurer Employment Code; any employee of a State agency who (i) holds the title or position of, or exercises substantially similar duties as a legislative liaison, Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Chief Fiscal Officer, Agency Human Resources Director, Public Information Officer, or Chief Information Officer and (ii) was neither included in a bargaining unit nor subject to an active petition for certification in a bargaining unit; any employee of a State agency who (i) is in a position that is Rutan-exempt, as designated by the employer, and completely exempt from jurisdiction B of the Personnel Code and (ii) was neither included in

a bargaining unit nor subject to an active petition for certification in a bargaining unit; any term appointed employee of a State agency pursuant to Section 8b.18 or 8b.19 of the Personnel Code who was neither included in a bargaining unit nor subject to an active petition for certification in a bargaining unit; any employment position properly designated pursuant to Section 6.1 of this Act; confidential employees; independent contractors; and supervisors except as provided in this Act.

Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act shall not be considered public employees for any purposes not specifically provided for in Public Act 93-204 or Public Act 97-1158, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/).

Child and day care home providers shall not be considered public employees for any purposes not specifically provided for in this amendatory Act of the 94th General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of stat-

utory retirement or health insurance benefits. Child and day care home providers shall not be covered by the State Employees Group Insurance Act of 1971.

Notwithstanding Section 9, subsection (c), or any other provisions of this Act, all peace officers above the rank of captain in municipalities with more than 1,000,000 inhabitants shall be excluded from this Act.

(*o*) Except as otherwise in subsection (*o*-5), "public employer" or "employer" means the State of Illinois; any political subdivision of the State, unit of local government or school district; authorities including departments, divisions, bureaus, boards, commissions, or other agencies of the foregoing entities; and any person acting within the scope of his or her authority, express or implied, on behalf of those entities in dealing with its employees. As of the effective date of the amendatory Act of the 93rd General Assembly, but not before, the State of Illinois shall be considered the employer of the personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, subject to the limitations set forth in this Act and in the Disabled Persons Rehabilitation Act. As of January 29, 2013 (the effective date of Public Act 97-1158), but not before except as otherwise provided in this subsection (*o*), the State shall be considered the employer of home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, no matter whether the State provides

those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise, but subject to the limitations set forth in this Act and the Disabled Persons Rehabilitation Act. The State shall not be considered to be the employer of home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, for any purposes not specifically provided for in Public Act 93-204 or Public Act 97-1158, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/). As of the effective date of this amendatory Act of the 94th General Assembly but not before, the State of Illinois shall be considered the employer of the day and child care home providers participating in the child care assistance program under Section 9A-11 of the Illinois Public Aid Code, subject to the limitations set forth in this Act and in Section 9A-11 of the Illinois Public Aid Code. The State shall not be considered to be the employer of child and day care home providers for any purposes not specifically provided for in this amendatory Act of

the 94th General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Child and day care home providers shall not be covered by the State Employees Group Insurance Act of 1971.

"Public employer" or "employer" as used in this Act, however, does not mean and shall not include the General Assembly of the State of Illinois, the Executive Ethics Commission, the Offices of the Executive Inspectors General, the Legislative Ethics Commission, the Office of the Legislative Inspector General, the Office of the Auditor General's Inspector General, the Office of the Governor, the Governor's Office of Management and Budget, the Illinois Finance Authority, the Office of the Lieutenant Governor, the State Board of Elections, and educational employers or employers as defined in the Illinois Educational Labor Relations Act, except with respect to a state university in its employment of firefighters and peace officers and except with respect to a school district in the employment of peace officers in its own police department in existence on the effective date of this amendatory Act of the 96th General Assembly. County boards and county sheriffs shall be designated as joint or co-employers of county peace officers appointed under the authority of a county sheriff. Nothing in this subsection (*o*) shall be construed to prevent the State Panel or the Local Panel from determining that employers are joint or co-employers.

5. 5 Ill. Comp. Stat. 315/6 (West 2013) provides:

Right to organize and bargain collectively; exclusive representation; and fair share arrangements

§ 6. Right to organize and bargain collectively; exclusive representation; and fair share arrangements.

(a) Employees of the State and any political subdivision of the State, excluding employees of the General Assembly of the State of Illinois and employees excluded from the definition of "public employee" under subsection (n) of Section 3 of this Act, have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment, not excluded by Section 4 of this Act, and to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion. Employees also have, and are protected in the exercise of, the right to refrain from participating in any such concerted activities. Employees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment as defined in Section 3(g).

(b) Nothing in this Act prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of

an employee organization; provided that the exclusive bargaining representative is afforded the opportunity to be present at such conference and that any settlement made shall not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative.

(c) A labor organization designated by the Board as the representative of the majority of public employees in an appropriate unit in accordance with the procedures herein or recognized by a public employer as the representative of the majority of public employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act. A public employer is required upon request to furnish the exclusive bargaining representative with a complete list of the names and addresses of the public employees in the bargaining unit, provided that a public employer shall not be required to furnish such a list more than once per payroll period. The exclusive bargaining representative shall use the list exclusively for bargaining representation purposes and shall not disclose any information contained in the list for any other purpose. Nothing in this Section, however, shall prohibit a bargaining representative from disseminating a list of its union members.

(d) Labor organizations recognized by a public employer as the exclusive representative or so designated in accordance with the provisions of this Act are responsible for representing the interests of all public

employees in the unit. Nothing herein shall be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious.

(e) When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, as defined in Section 3 (g), but not to exceed the amount of dues uniformly required of members. The organization shall certify to the employer the amount constituting each nonmember employee's proportionate share which shall not exceed dues uniformly required of members. In such case, the proportionate share payment in this Section shall be deducted by the employer from the earnings of the nonmember employees and paid to the employee organization.

(f) Only the exclusive representative may negotiate provisions in a collective bargaining agreement providing for the payroll deduction of labor organization dues, fair share payment, initiation fees and assessments. Except as provided in subsection (e) of this Section, any such deductions shall only be made upon an employee's written authorization, and continued until revoked in writing in the same manner or until the termination date of an applicable collective bargaining agreement. Such payments shall be paid to the exclusive representative.

Where a collective bargaining agreement is terminated, or continues in effect beyond its scheduled expiration date pending the negotiation of a successor agreement or the resolution of an impasse under Section 14, the employer shall continue to honor and abide by any dues deduction or fair share clause contained therein until a new agreement is reached including dues deduction or a fair share clause. For the benefit of any successor exclusive representative certified under this Act, this provision shall be applicable, provided the successor exclusive representative:

(i) certifies to the employer the amount constituting each non-member's proportionate share under subsection (e); or

(ii) presents the employer with employee written authorizations for the deduction of dues, assessments, and fees under this subsection.

Failure to so honor and abide by dues deduction or fair share clauses for the benefit of any exclusive representative, including a successor, shall be a violation of the duty to bargain and an unfair labor practice.

(g) Agreements containing a fair share agreement must safeguard the right of nonassociation of employees based upon bona fide religious tenets or teachings of a church or religious body of which such employees are members. Such employees may be required to pay an amount equal to their fair share, determined under a lawful fair share agreement, to a nonreligious charitable organization mutually agreed upon by the employees affected and the exclusive bargaining representative to which such employees would otherwise

pay such service fee. If the affected employees and the bargaining representative are unable to reach an agreement on the matter, the Board may establish an approved list of charitable organizations to which such payments may be made.

6. 5 Ill. Comp. Stat. 315/7 (West 2013) provides:

Duty to bargain

§ 7. Duty to bargain. A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.

For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law.

If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

The duty "to bargain collectively" shall also include negotiations as to the terms of a collective bargaining agreement. The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois "Uniform Arbitration Act"[1] unless agreed by the parties.

The duty "to bargain collectively" shall also mean that no party to a collective bargaining contract shall terminate or modify such contract, unless the party desiring such termination or modification:

(1) serves a written notice upon the other party to the contract of the proposed termination or modification 60 days prior to the expiration date thereof, or in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Board within 30 days after such notice of the existence of a dispute, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of 60 days after such notice is given to the other party or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization, which is a party to the contract, has been superseded as or ceased to be the exclusive representative of the employees pursuant to the provisions of subsection (a) of Section 9, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Collective bargaining for home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers under the Home Services Program shall be limited to the terms and conditions of employment under the State's control, as defined in Public Act 93-204 or this amendatory Act of the 97th General Assembly, as applicable.

Collective bargaining for child and day care home providers under the child care assistance program shall be limited to the terms and conditions of employment under the State's control, as defined in this amendatory Act of the 94th General Assembly.

Notwithstanding any other provision of this Section, whenever collective bargaining is for the purpose of establishing an initial agreement following original certification of units with fewer than 35 employees, with respect to public employees other than peace officers, fire fighters, and security employees, the following apply:

(1) Not later than 10 days after receiving a written request for collective bargaining from a labor organization that has been newly certified as a representative as defined in Section 6(c), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

(2) If anytime after the expiration of the 90-day period beginning on the date on which bargaining is commenced the parties have failed to reach an agreement, either party may notify the Illinois Public Labor Relations Board of the existence of a dispute and request mediation in accordance with the provisions of Section 14 of this Act.

(3) If after the expiration of the 30-day period beginning on the date on which mediation commenced, or such additional period as the parties may agree upon, the mediator is not able to bring the parties to

agreement by conciliation, either the exclusive representative of the employees or the employer may request of the other, in writing, arbitration and shall submit a copy of the request to the board. Upon submission of the request for arbitration, the parties shall be required to participate in the impasse arbitration procedures set forth in Section 14 of this Act, except the right to strike shall not be considered waived pursuant to Section 17 of this Act, until the actual convening of the arbitration hearing.

7. 20 Ill. Comp. Stat. 2405/3(f) (West Supp. 2013) provides:

Powers and duties

§ 3. Powers and duties. The Department shall have the powers and duties enumerated herein:

* * * * *

(f) To establish a program of services to prevent the unnecessary institutionalization of persons in need of long term care and who meet the criteria for blindness or disability as defined by the Social Security Act, thereby enabling them to remain in their own homes. Such preventative services include any or all of the following:

(1) personal assistant services;

(2) homemaker services;

(3) home-delivered meals;

(4) adult day care services;

(5) respite care;

(6) home modification or assistive equipment;

(7) home health services;

(8) electronic home response;

(9) brain injury behavioral/cognitive services;

(10) brain injury habilitation;

(11) brain injury pre-vocational services; or

(12) brain injury supported employment.

The Department shall establish eligibility standards for such services taking into consideration the unique economic and social needs of the population for whom they are to be provided. Such eligibility standards may be based on the recipient's ability to pay for services; provided, however, that any portion of a person's income that is equal to or less than the " protected income" level shall not be considered by the Department in determining eligibility. The "protected income" level shall be determined by the Department, shall never be less than the federal poverty standard, and shall be adjusted each year to reflect changes in the Consumer Price Index For All Urban Consumers as determined by the United States Department of Labor. The standards must provide that a person may not have more than $10,000 in assets to be eligible for the services, and the Department may increase or decrease the asset limitation by rule. The Department may not decrease the asset level below $10,000.

The services shall be provided, as established by the Department by rule, to eligible persons to prevent

unnecessary or premature institutionalization, to the extent that the cost of the services, together with the other personal maintenance expenses of the persons, are reasonably related to the standards established for care in a group facility appropriate to their condition. These non-institutional services, pilot projects or experimental facilities may be provided as part of or in addition to those authorized by federal law or those funded and administered by the Illinois Department on Aging. The Department shall set rates and fees for services in a fair and equitable manner. Services identical to those offered by the Department on Aging shall be paid at the same rate.

Personal assistants shall be paid at a rate negotiated between the State and an exclusive representative of personal assistants under a collective bargaining agreement. In no case shall the Department pay personal assistants an hourly wage that is less than the federal minimum wage.

Solely for the purposes of coverage under the Illinois Public Labor Relations Act (5 ILCS 315/), personal assistants providing services under the Department's Home Services Program shall be considered to be public employees and the State of Illinois shall be considered to be their employer as of the effective date of this amendatory Act of the 93rd General Assembly, but not before. The State shall engage in collective bargaining with an exclusive representative of personal assistants working under the Home Services Program concerning their terms and conditions of employment that are within the State's control. Nothing in this paragraph shall be understood to limit the right

of the persons receiving services defined in this Section to hire and fire personal assistants or supervise them within the limitations set by the Home Services Program. The State shall not be considered to be the employer of personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal assistants shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/).

The Department shall execute, relative to nursing home prescreening, as authorized by Section 4.03 of the Illinois Act on the Aging, written inter-agency agreements with the Department on Aging and the Department of Healthcare and Family Services, to effect the intake procedures and eligibility criteria for those persons who may need long term care. On and after July 1, 1996, all nursing home prescreenings for individuals 18 through 59 years of age shall be conducted by the Department, or a designee of the Department.

The Department is authorized to establish a system of recipient cost-sharing for services provided under this Section. The cost-sharing shall be based upon the recipient's ability to pay for services, but in no case shall the recipient's share exceed the actual cost of the services provided. Protected income shall not be considered by the Department in its determination of the recipient's ability to pay a share of the cost of services. The level of cost-sharing shall be adjusted each year to reflect changes in the "protected income"

level. The Department shall deduct from the recipient's share of the cost of services any money expended by the recipient for disability-related expenses.

To the extent permitted under the federal Social Security Act, the Department, or the Department's authorized representative, may recover the amount of moneys expended for services provided to or in behalf of a person under this Section by a claim against the person's estate or against the estate of the person's surviving spouse, but no recovery may be had until after the death of the surviving spouse, if any, and then only at such time when there is no surviving child who is under age 21, blind, or permanently and totally disabled. This paragraph, however, shall not bar recovery, at the death of the person, of moneys for services provided to the person or in behalf of the person under this Section to which the person was not entitled; provided that such recovery shall not be enforced against any real estate while it is occupied as a homestead by the surviving spouse or other dependent, if no claims by other creditors have been filed against the estate, or, if such claims have been filed, they remain dormant for failure of prosecution or failure of the claimant to compel administration of the estate for the purpose of payment. This paragraph shall not bar recovery from the estate of a spouse, under Sections 1915 and 1924 of the Social Security Act and Section 5-4 of the Illinois Public Aid Code, who precedes a person receiving services under this Section in death. All moneys for services paid to or in behalf of the person under this Section shall be claimed for recovery from the deceased spouse's es-

tate. "Homestead", as used in this paragraph, means the dwelling house and contiguous real estate occupied by a surviving spouse or relative, as defined by the rules and regulations of the Department of Healthcare and Family Services, regardless of the value of the property.

The Department shall submit an annual report on programs and services provided under this Section. The report shall be filed with the Governor and the General Assembly on or before March 30 each year.

The requirement for reporting to the General Assembly shall be satisfied by filing copies of the report with the Speaker, the Minority Leader and the Clerk of the House of Representatives and the President, the Minority Leader and the Secretary of the Senate and the Legislative Research Unit, as required by Section 3.1 of the General Assembly Organization Act, and filing additional copies with the State Government Report Distribution Center for the General Assembly as required under paragraph (t) of Section 7 of the State Library Act.6

8. Ill. Admin. Code tit. 89, § 676.10 (2013) provides:

Program Purpose and Types

a) The Department of Human Services (DHS) Home Services Program (HSP) is a Medicaid Waiver Program (42 CFR 440.180) designed to prevent the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State.

b) The Medicaid Waiver for the State of Illinois is administered by the Illinois Department of Public Aid (DPA), as the State's approved Medicaid agency. The operational responsibility for HSP, with the exception of hearings on customer appeals (see 89 Ill. Adm. Code 510), rests with DHS.

c) Although DHS shall be responsible for ensuring that the funds available under the HSP are administered in accordance with all applicable laws, DHS shall not have control or input in the employment relationship between the customer and the personal assistants.

9. Ill. Admin. Code tit. 89, § 676.30 (2013) provides:

Definitions

For the purposes of this Subchapter, unless otherwise stated, the following terms shall have the following meanings.

a) Activities of Daily Living (ADLs) - those tasks an individual must do, or which an individual must have provided for him/her, in order to prevent institutionalization (i.e., bathing, dressing, shopping, cooking, housekeeping, etc.).

b) Customer - anyone who:

1) has been referred to HSP for a determination of eligibility for services;

2) has applied for services through HSP;

3) is receiving services through HSP; or

4) has received services through HSP.

If the customer is unable to satisfy any of his/her obligations under the HSP, including, without limitation, the obligation to serve as the employer of the PA, the customer's parent, family member, guardian, or duly authorized representative may act on behalf of the customer and is included within the definition of "customer", as used throughout this Part.

For purposes of the PA services performed pursuant to the HSP, the customer shall serve as the employer of the PA. In this capacity, the customer is responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing (where, in the opinion of the customer, it is appropriate or necessary) disciplinary action against the PA, and terminating the employment relationship between the customer and the PA.

c) Counselor - the DHS-ORS staff person or contractual Case Manager who helps to ensure that the funds available under the HSP are properly distributed in accordance with the Service Plan, any applicable waiver programs, and all applicable laws.

d) Determination of Need (DON) - the assessment tool used to determine an individual's non-financial eligibility for HSP services based on the individual's impairment and need for care. This form measures the level of risk of institutionalization for the individual.

e) DHS - Illinois Department of Human Services.

f) DPA - Illinois Department of Public Aid.

g) Family - any one related by blood, marriage, or adoption to the individual seeking services through HSP or anyone with whom the individual has a close inter-personal relationship and who resides with the individual.

h) Family Unit - for the purposes of determining financial eligibility, the number of persons derived when counting the individual seeking services through HSP and the number of persons in the household who are legally responsible for the individual seeking services and for whom the individual seeking services is legally responsible.

i) HCFA - the federal Health Care Financing Administration.

j) Home Services Program (HSP) - a State and federally funded program designed to allow Illinois residents, who are at risk of unnecessary or premature institutionalization, to receive necessary care and services in their homes, as opposed to being placed in an institution.

k) Home - a private residence where the customer lives which is not an intermediate care or skilled nursing facility as defined at 77 Ill. Adm. Code 300, or a residential program operated by, or for which funding is provided by, the Illinois Department of Human Services, Office of Mental Health and Office of Developmental Disabilities as defined at 59 Ill. Adm. Code 120. For the purposes of this Subchapter, the term "home" shall include domestic violence shelters as defined in Section 1(c) of the Domestic Violence Shelter Act [20 ILCS 2210/1(c)] and publicly or privately administered shelters designed to provide temporary living accommodations for persons who are homeless.

l) Intermediate Care Facility (ICF) - a nursing facility that provides regular health related care to its residents, as well as those services necessary for safe and adequate living.

m) Legally Responsible Family Member - a spouse, parent of a child who is under age 18 or a legal guardian of an individual who is under age 18.

n) Medicaid - the Medicaid program administered by DPA under the Public Aid Code [305 ILCS 5/11].

o) Medicaid Waiver - the waiver allowing HSP to claim federal reimbursement for approved levels of in-home care for individuals who would otherwise be placed in institutions for such care. The Medicaid Waiver is overseen at the federal level by HCFA.

p) Personal Assistant (PA) - an individual employed by the customer to provide through HSP varied services that have been approved by the customer's physician.

q) Personal Assistant Backup Plan - the plan developed by the customer and designed to ensure that the customer receives the necessary care and services under the HSP in the event that his/her regular PA is unavailable or unwilling to perform his/her obligations under the HSP. The customer is responsible for designating the backup personal assistant.

r) Physician - a licensed doctor of medicine (M.D.) or doctor of Osteopathy (D.O.) licensed pursuant to the Medical Practice Act [225 ILCS 60].

s) Prescreening - an assessment to determine an individual's need for institutional care at the ICF or SNF level care, to ensure Medicaid payment for such a placement is appropriate, and the assessment as to whether or not HSP services are an appropriate alternative to institutional care for the individual.

t) Service Cost Maximum (SCM) - the maximum monthly amount which may be expended for HSP services for an eligible individual. This amount is determined based on the individual's DON score and the specific programmatic component of HSP through which the individual is being served.

u) Service Plan - specifically, the Home Services Program Service Plan (IL 488-1049), Home Services Program Service Plan Addendum (IL 488-1050) or the Interim Agreement (IL 488-2344) forms, on which all services to be provided to an individual through HSP are listed.

v) Services - the necessary tasks provided to an individual, in one or more of the areas listed in Section 676.40 and listed on the individual's Service Plan, through HSP with the intent of preventing the unnecessary institutionalization of the individual.

w) Skilled Nursing Facility (SNF) - a facility that provides regular and on-going nursing level care to its residents due to the residents' medical conditions, as well as those services necessary for safe and adequate living.

10. Ill. Admin. Code tit. 89, § 676.200 (2013) provides:

Vendor Payment

Because HCFA regulations (42 CFR 447.10(d)) prohibit re-assignment of provider claims, no payment will be made directly to any customer of the HSP. In order to ensure that HSP funds are administered properly, no payment, on behalf of any customer, will be made to any vendor unless the services for which the payment is to be made were approved by DHS-HSP. No payment, on behalf of any customer, shall be made until after service has been rendered and verified.

11. Ill. Admin. Code tit. 89, § 677.40 (2013) provides:

Freedom of Choice

Under the HSP, a customer has the following rights; however, the choices made by the customer may affect the services available through HSP for which the customer is eligible or which might otherwise be available.

a) A customer shall have the right to apply for and, if eligible, receive services under the program of the customer's choice. Therefore, a customer eligible for both institutional care and HSP services has the right to choose one or the other, but may not receive both at the same time. Institutional care is not available through HSP and, if the customer chooses HSP services, DHS-ORS shall have the right to determine the waiver under which the customer will be served and the level of the provider of services.

b) At any time, a customer has the right not to accept those HSP services that he/she has been determined eligible to receive. However, if the customer chooses to terminate services, he/she may have to reapply for services and undergo another determination of eligibility if he/she later desires services through HSP.

c) A customer has the right to choose his/her living arrangement, including the physical dwelling and persons residing in the dwelling. However, such choices may impact the amount or scope of the services received by the customer.

HSP will not impose a living arrangement on any customer.

d) A customer applying for, or receiving, services through HSP shall have the right to choose medical and non-medical service providers. However, payment may only be made to those service providers which meet the standards established by DHS as found at 89 Ill. Adm. Code 686 and who will accept DHS' fees for a specific service approved by DHS, if DHS is to issue payment for the service.

12. Ill. Admin. Code tit. 89, § 684.10 (2013) provides:

Service Plan

a) All services to be provided to a customer through HSP must be necessary to meet an unmet care need of the individual or to provide relief to the caregiver for customers eligible for respite care services and listed on a HSP Service Plan which is developed for the customer, agreed to and signed by the customer and counselor.

b) Services provided through HSP to a customer must be:

1) safe and adequate;

2) cost effective; and

3) the most economical in terms of the customer's needs, unless a service is not available at the most economical level. In such in-

stances, the next higher service level may be used as long as services remain within the SCM established for the customer. Documentation of an ongoing effort to locate services at the appropriate level must be in the customer's case file.

c) The initial HSP Service Plan for a customer must be submitted with all other necessary forms to the customer's physician during the eligibility determination phase of the case (89 Ill. Adm. Code 682.100(g)) for the purpose of review and approval of the plan for care by the physician.

13. Ill. Admin. Code tit. 89, § 684.40 (2013) provides:

Distribution of the Service Plan

A copy of the approved HSP Service Plan for the customer must be given to the customer and each service provider, and a copy must be retained for the case file.

14. Ill. Admin. Code tit. 89, § 684.50 (2013) provides:

Service Plan Content

The HSP Service Plan shall include the type of service(s) to be provided to the customer, the specific tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, the rate of payment for the service(s), and, if the customer is receiving PA services, the customer's plan for backup if the usual

PA is not available to provide the services and the next planned date for redetermination.

15. Ill. Admin. Code tit. 89, § 684.75 (2013) provides:

Required Physician's Certification of HSP Service Plan

a) A Physician's Certification (IL 488-1780) shall be obtained from the customer's physician when:

1) the customer's initial service plan is developed (Section 684.10); and

2) at least every two years during the redetermination of eligibility.

b) The services provided to the customer shall not be interrupted while the new Physician's Certification is being secured by DHS-DRS/HSP

16. Ill. Admin. Code tit. 89, § 686.10 (2013) provides:

Personal Assistant (PA) Requirements

In order to be employed by a customer as a PA (89 Ill. Adm. Code 676.30(q)), an individual must:

a) have a Social Security number and provide DHS with documented verification of this number;

b) be a minor between 14 and 16 years of age who is not employed during school hours, has an employment certificate and meets all other requirements of the Child Labor Law [820 ILCS 205] and has an adult who is at least 21 years of

age and who is legally responsible for the customer who will supervise the PA; be 16 years of age or older, enrolled in school and not employed during school hours; or be 17 years of age or older and not enrolled in school;

c) have provided to the customer at least two written or verbal recommendations from present or former employers, the recommendation of a Center for Independent Living (CIL), or, if never employed, references from at least two non-relatives;

d) be able to communicate with the customer to the satisfaction of the customer and counselor;

e) be able to follow directions to the satisfaction of the customer and counselor;

f) have previous experience and/or training that is adequate and consistent with the specific tasks required for safe and adequate care of the customer;

g) if the customer has a contagious infectious disease, have a physician, health care institution (i.e., hospital, nursing home, home health agency), or CIL certify, in writing, that he/she has the knowledge of precautionary procedures for the control of contagious infectious diseases, if it is anticipated that he/she will come into contact with bodily fluids, or be evaluated by a Registered Nurse licensed pursuant to the Illinois Nursing and Nursing Practices Act of 1987 [225

ILCS 65] to determine that he/she has knowledge of such procedures;

h) complete an EMPLOYMENT AGREEMENT between the customer and PA that certifies the PA:

1) shall provide services to the individual in accordance with his/her SERVICE PLAN (IL 499-1049) (89 Ill. Adm. Code 676.30(u));

2) shall submit a bi-monthly calendar listing actual hours worked each pay period (1-15; 16-last working day of the month), as verified by the customer and in accordance with the number of hours authorized by DHS. The PA shall not claim more hours than approved by DHS unless prior approval has been granted by the counselor to address a temporary increased service need;

3) shall make available to DHS and other designated agencies those records described in subsection (h)(2);

4) shall maintain all customer information as confidential and not for release, either in writing or verbally, to anyone other than those designated by DHS in writing;

5) shall not subcontract to any other person, any of the services he/she has agreed to provide;

6) shall provide services only while the individual is in his/her home or during the pe-

riod covered by Section 684.60 (Provision of Services);

7) shall agree that the customer is responsible for locating, choosing, employing, supervising, training, and disciplining as necessary the PA. Further, that the State of Illinois does not provide paid vacation, holiday, or sick leave; however, such absences shall be reported to the DHS counselor per the HOME SERVICES TIME SHEET (IL 488-2251) only for the purposes of processing payment;

8) understands that DHS reports all payments made to a PA to the Illinois Department of Employment Security (DES) and that the PA may apply for unemployment benefits, but DES, not DHS, makes the determination as to whether the PA shall receive benefits;

9) understands that he/she may apply for Workers' Compensation benefits through DHS and that some customers may carry such insurance coverage; however, DHS maintains that the customer, not DHS, is the employer for these purposes; and

10) understands that DHS will withhold Social Security tax (FICA) from payments made to him/her. Federal and State income tax shall be withheld if the PA completes and returns to DHS two separate W-4 forms;

i) complete an I-9 Immigration form, which must be retained by the customer;

j) for PAs starting on or after April 13, 1992, complete a PA STANDARDS (IL 488-2112) to be returned to DHS;

k) as of April 13, 1992, at the time of redetermination of eligibility of the customer by which he/she is employed, have completed by the customer, a PERSONAL ASSISTANT EVALUATION (IL 488-2089); and

l) if requested by the customer, give permission and the necessary information for the customer to request a conviction background check from the Illinois State Police. This permission will require the prospective PA to sign the appropriate form provided by the customer.

17. Ill. Admin. Code tit. 89, § 686.20 (2013) provides:

Services Which May Be Provided by a PA

A PA may perform or assist with:

a) household tasks, shopping, or personal care;

b) incidental health care tasks which do not require independent judgment, with the permission of the customer's physician, customer, and/or family; and

c) monitoring to ensure the health and safety of the customer.

18. Ill. Admin. Code tit. 89, § 686.30 (2013) provides:

Annual Review of PA Performance

a) Pursuant to 686.10(k), annually, at the time of redetermination of the individual's eligibility, a Personal Assistant Evaluation (IL 488-2089) shall be completed, by the customer with assistance of the counselor, for each PA providing services through HSP.

b) PAs shall be evaluated based upon:

1) accuracy of work (e.g., ranging from making many errors to few errors);

2) cleanliness of working area (e.g., ranging from very untidy to exceptionally clean);

3) use of work time (e.g., ranging from very wasteful to very efficient);

4) responsibility (e.g., ranging from irresponsible to responsible);

5) attendance (e.g., ranging from frequently absent or late to always prompt); and

6) attitude towards the customer (e.g., ranging from disrespectful to respectful).

c) The outcome of the evaluation shall be mediated by the counselor between the PA and the customer regarding any unresolved issues, up to and including replacement of the PA by the customer, if necessary.

19. Ill. Admin. Code tit. 89, § 686.40 (2013) provides:

Payment for PA Services

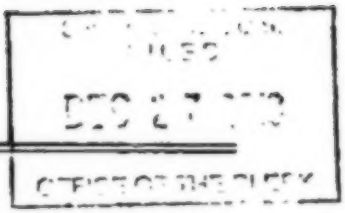
a) PAs shall be paid at the hourly rate set by law, but never less than the current federal minimum wage.

b) PAs shall be paid twice each month for services rendered. The first payment shall be for any services rendered by the PA, pursuant to the customer's Service Plan, from the first day of the month through the fifteenth day of the month. The second payment shall be for any services rendered by the PA, pursuant to the customer's Service Plan, from the sixteenth day of the month through the last day of the month.

c) No PA shall be reimbursed by DHS-DRS for services rendered to one or more HSP customers for more than 16 hours in a 24-hour period. The counselor may grant an exception should an emergency occur that results in the loss of a paid or unpaid primary caregiver who resides with the customer, and there is imminent danger to the health, safety and well being of the customer. When this occurs, the additional hours may not exceed the annual service cost maximum (SCM). The 16-hour limitation does not apply to PAs providing respite services.

AMICUS CURIAE BRIEF

No. 11-681



In The
Supreme Court of the United States

PAMELA HARRIS, et al.,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL COUNCIL ON AGING, AND OTHER DISABILITY AND SENIOR ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*

Amici are disability rights organizations and organizations of people with disabilities and senior citizens who use personal assistance services to promote independence, integration, and freedom from institutionalization.[1] This case presents a constitutional challenge to the arrangements a number of states have adopted to provide representation and collective bargaining rights to the workers who provide personal assistance. Those arrangements have typically resulted from a process in which people with disabilities have actively participated and asserted their interests. The structure of those arrangements, in which state law provides that the employer's role is shared by the individual consumer with a disability (who has the power to hire, fire, and supervise the person who provides her services) and the state (which has the power to set other key terms and conditions of employment), serves to implement the philosophy of independent living and the principle of consumer control for which the disability rights movement has fought very hard. *Amici*, many of which are located in states that have adopted these collective-bargaining arrangements, are concerned that a ruling invalidating them will undermine the

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[1] Counsel for the parties have filed with the Clerk blanket consents to the filing of *amicus* briefs in this matter. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

interests and independence of individuals with disabilities. *Amici* are listed and described in the appendix to this brief.

SUMMARY OF ARGUMENT

Petitioners argue that personal assistants who provide in-home services to persons with disabilities under Illinois's Medicaid program are not "true public employees," because the individual consumers retain the power to hire, fire, and supervise the assistants who provide services to them personally. That argument misconstrues the relationship between personal assistants, individuals with disabilities, and the state under the Illinois Medicaid program. Under that program, the state and the individual consumer share the responsibilities of an employer. The consumer has the power to choose the individual who will provide her services and to supervise that individual on a day-to-day basis, while the state retains the power to set workforce-wide terms and conditions of employment.

This sharing of responsibilities directly responds to the concerns of people with disabilities. The American disability rights movement is based on a philosophy of independent living. That philosophy supports policies that ensure that people with disabilities have the opportunity to participate fully in society and control the day-to-day and minute-to-minute aspects of their lives. Consumer-controlled personal assistance

services, in which individuals with disabilities hire, fire, and direct the individuals who provide services to them, are a key means of making the philosophy of independent living a reality and preventing unnecessary institutionalization. Responding to the urgings of disability rights activists, changes in federal funding rules, and this Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), states have increasingly provided for consumer-controlled personal assistance services under their Medicaid programs.

Although disability rights activists urged states to provide consumer-controlled personal assistance services – services that granted to individuals with disabilities key aspects of the employer role – they recognized that there are certain aspects of the employment relationship that individual consumers are unlikely to be in a position to manage. States like Illinois have accordingly retained authority over those systemic terms and conditions of employment, and they have appropriately authorized personal assistants to bargain collectively with the state itself over them. Collective bargaining over those systemic terms and conditions of employment has served the interests and independence of individuals with disabilities by helping to promote a stable personal assistant workforce. A ruling that declared Illinois's arrangement unconstitutional would disserve individuals with disabilities and undermine efforts to achieve the goals of independent living.

ARGUMENT

Petitioners argue that personal assistants who provide in-home services to people with disabilities under Illinois's Medicaid program are not "true public employees." Pet. Br. 15. They contend that those personal assistants "are not managed or supervised by the State, but by the person with disabilities who employs them." *Id.* at 39. These arguments fundamentally misconstrue the relationship between personal assistants, individuals with disabilities, and the state under Illinois's Medicaid program. Under that program, the state and the individual with a disability share the responsibilities of an employer. The sharing of responsibilities directly achieves the goal of providing stable and – crucially – truly consumer-directed services.

Central to this arrangement is the opportunity for personal assistants to collectively bargain with the state over key terms and conditions of employment – including wages and employment-related benefits that only the state, and not an individual consumer, is in a position to provide – while ensuring that they are subject to the day-to-day supervision, and hiring and firing authority, of the individuals with disabilities to whom they provide services. Because the state directly controls substantial aspects of the terms and conditions of a personal assistant's employment, and the state has determined that personal assistants may choose to bargain collectively over those terms and conditions, the bargaining agent they select may properly collect an agency fee from

those on whose behalf it must act. See, *e.g.*, *Locke v. Karass*, 555 U.S. 207, 213 (2009).

A contrary conclusion would severely undermine the interests and independence of the individuals with disabilities who receive personal assistance through Illinois's program. If the state chose to continue providing the program's workers with effective collective bargaining rights, it would be forced to abandon the principle of consumer control over hiring, firing, and day-to-day supervision. But people with disabilities, acting through the disability rights and independent living movements, fought long and hard for state laws granting them the right to control these aspects of the assistance they receive. Alternatively, the state could abandon collective bargaining and simply treat personal-assistance workers for all purposes as employees of the individual consumers they serve. But that would deprive the workers of the opportunity to bargain over those terms and conditions of employment that individual consumers are often in no position to set – including wages and benefits. Collective bargaining over those terms and conditions of employment has led in many states to significant improvements in wages and benefits, and – most important for people with disabilities – to increased stability and reduced turnover in the market for personal assistants. This Court should not jeopardize those developments. It should instead affirm the judgment of the Seventh Circuit.

A. Consumer-Directed Personal Assistance and the Independent Living Philosophy

Over the past several decades, people with disabilities have urged states to provide them supportive services in their own homes, so that they need not enter nursing homes or other institutions. These demands have stemmed from a philosophy of independent living, indigenous to the disability rights movement, which supports policies that ensure that people with disabilities have the opportunity to participate fully in society and control the day-to-day and minute-to-minute aspects of their lives.[2] As Ed Roberts, one of the early leaders of the American disability rights movement, described that philosophy, the concept of "independent living"

> meant active participation in society – working, having a home, raising a family, and generally sharing in the joys and responsibilities of community life. Independent living meant freedom from isolation and institutionalization; it meant the ability to choose where to live, how to live, and how to carry

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[2] See Edward Berkowitz, Disabled Policy: America's Programs for the Handicapped 197-207 (1987); James I. Charlton, Nothing About Us Without Us: Disability Oppression and Empowerment 130-32 (1998); Gerben DeJong, *Defining and Implementing the Independent Living Concept*, in Independent Living for Physically Disabled People 4, 8 (Nancy M. Crewe & Irving Kenneth Zola, eds., 1983).

> out the activities of daily living that most able-bodied people take for granted.[3]

The Americans with Disabilities Act explicitly embraces the philosophy of independent living. See 42 U.S.C. § 12101(a)(7) (finding that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals").

Personal assistance services, controlled by individuals with disabilities themselves, can be a crucial tool for making independent living a reality – if a stable workforce is available. See Andrew I. Batavia, *A Right to Personal Assistance Services: "Most Integrated Setting Appropriate" Requirements and the Independent Living Model of Long-Term Care*, 27 Am. J. L. & Med. 17, 20 (2001) ("Access to consumer-directed personal assistance services is also one of the foundational policy issues of the independent living movement, in which disability rights advocates have struggled for the past three decades to empower people with disabilities to live independently in their communities, rather than in institutions.").[4] Many

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[3] Edward V. Roberts, *A History of the Independent Living Movement: A Founder's Perspective*, in Psychosocial Interventions With Physically Disabled Persons 231, 237 (Bruce W. Heller et al., eds., 1989).

[4] See also Lynn May Rivas, A Significant Alliance: The Independent Living Movement, the Service Employees International Union, and the Establishment of the First Public Authorities in California 2-3 (2005) (describing the importance of

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individuals with disabilities cannot physically carry out various tasks of daily life. But they are fully capable of deciding for themselves what tasks to undertake and how to do so. The independent living philosophy posits that this sort of *decisional* autonomy is the key aspect of independence. In the words of another leading disability rights activist, "The Independent Living Movement argues that it is more important for us to have full control over our lives than over our bodies. We will give up doing some things for ourselves if we can determine when and how they are to be done."[6]

Consumer-directed personal assistance gives individuals with disabilities this sort of control. An individual with a disability hires and directs a "personal assistant" to perform the tasks that the disabled person cannot physically perform herself. The personal assistant acts "as an extension of the disabled person and follows the individual's directions as to how to meet his or her needs." Andrew I. Batavia,

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personal assistance services to achieving the goals of independent living).

[6] Irving Kenneth Zola, *Developing New Self-Images and Interdependence*, in Independent Living for Physically Disabled People, *supra*, at 49, 58. See also Adrienne Asch, *Disability, Bioethics, and Human Rights*, in Handbook of Disability Studies 297, 313 (Gary L. Albrecht et al., eds., 2001) (arguing that "independence need not be viewed in physical terms" but that instead "self-direction, self-determination, and participation in decision making about one's life are more genuine and authentic measures of desirable independence").

Gerben DeJong & Louise Bouscaren McKnew, *Toward a National Personal Assistance Program: The Independent Living Model of Long-Term Care for Persons with Disabilities*, 16 J. Health Pol., Pol'y & L. 523, 529 (1991). Consumer-directed personal assistance "is based on the premise that persons with disabilities should be empowered to live as independently as possible and that physical (and even cognitive) limitations should not be barriers to expressing preferences and making decisions about the services they receive and about how they conduct their lives." A.E. Benjamin, *Consumer-Directed Services at Home: A New Model for Persons with Disabilities*, 20 Health Aff. 80, 82-83 (2001). Although the concept of consumer direction originated in the disability rights movement, it has come to benefit older adults with chronic conditions who need help with activities of daily living, who may not identify as "persons with a disability" yet who welcome the option to make their own choices about needed Medicaid home care services. See A.E. Benjamin & Ruth E. Matthias, *Age, Consumer Direction, and Outcomes of Supportive Services at Home*, 41 Gerontologist 632 (2001) (finding that older personal care users generally embrace consumer direction and manage within it like younger users); AARP Public Policy Institute, *Consumer-Directed Personal Care Services for Older People in the U.S.*, Issue Brief No. 64, available at http://goo.gl/B9q54C.

In recent decades, states have vastly expanded the provision of consumer-directed personal assistance services under their Medicaid programs. See Batavia, *supra*; Benjamin, *supra*. In doing so, they have responded to the urgings of disability rights activists.[6] Changes in Medicaid rules to encourage states to provide services and supports outside of institutional settings have contributed to this development.[7] And this Court's own decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), which held that the ADA requires states to administer services in the most integrated setting appropriate to individuals with disabilities, played a crucial role in spurring the expansion of personal assistance services that promote community integration. See generally Brian J. Stout, Kristofer J. Hagglund & Mary J. Clark, *The Challenge of Financing and Delivering Personal Assistant Services*, 19 J. Disability Pol'y Stud. 44, 46-47 (2008) (describing how the disability rights movement, the ADA and the *Olmstead* decision, and

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[6] See A.E. Benjamin & Mary L. Fennell, *Putting the Consumer First: An Introduction and Overview*, 42 HSR: Health Services Res. 353 (2007); Dennis L. Kodner, *Consumer-Directed Services: Lessons and Implications for Integrated Systems of Care*, 3 Int'l J. Integrated Care 1 (2003).

[7] The most important change was Congress's creation of the Home and Community-Based Services waiver program by adding Section 1915(c) to the Medicaid Act, now codified at 42 U.S.C. § 1396n(c), in 1983. Other crucial changes came in Medicaid Act provisions that authorized payment for home and community-based services as part of a state's Medicaid plan, see 42 U.S.C. § 1396n(i), (j), (k).

changes in Medicaid have led to increased reliance on consumer-directed personal assistance).

Medicaid-funded, consumer-directed personal assistance ensures that people with disabilities can achieve the goals of independent living. It does so by enabling people with disabilities to make effective choices about how to live their own lives, on a day-to-day and even minute-to-minute basis. It also frees people with disabilities of dependence on the uncompensated assistance of parents and other relatives. Reliance on parents – who are understandably paternalistic toward their (disabled *or* nondisabled) adult children – can undermine the independence and control that consumer-directed personal assistance provides to individuals with disabilities.[8] Freeing

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[8] See Batavia, *supra*, at 21 (reliance on family members as personal assistants places "stress" on "their caregivers and their relationships with these individuals" and requires many consumers to "subvert their care preferences to the wills and schedules of their caregivers"); Batavia, DeJong & McKnew, *supra*, at 527 (reliance on family members can result in "an unhealthy dependency on family members, which diminishes opportunities for personal growth and independence"); Benjamin, *supra*, at 88 (noting "the argument from some disability advocates that family members should be the last choice in hiring, since familial ties complicate what should be an employer-employee relationship between consumers and workers"); A.E. Benjamin, Ruth Matthias & Todd M. Franke, *Comparing Consumer-Directed and Agency Models for Providing Supportive Services at Home*, 35 HSR: Health Services Res. 351, 362 (2000) ("Many advocates for younger adults with disabilities oppose the hiring of family members in service roles, because family ties are seen as constraints on the autonomy of consumers in selecting and directing their service workers."); Brian R. Grossman,

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disabled adults from paternalistic restrictions on their choices has long been a key goal of the disability rights movement.[9] The provision of consumer-directed services directly advances that key goal by giving people with disabilities the opportunity to obtain independence-promoting personal assistance from workers who are not their relatives. Although many individuals with disabilities have chosen to continue to receive assistance from relatives,[10] many others do not have relatives who can provide assistance – and still others have made the choice to hire their assistants on the open market. A Medicaid program that promotes the availability of a robust personal-assistance workforce gives individuals with disabilities this important choice, increases the likelihood

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Martin Kitchener, Joseph T. Mullan & Charlene Harrington, *Paid Personal Assistance Services: An Exploratory Study of Working-Age Consumers' Perspectives*, 19 J. Aging & Social Pol'y 27, 38 (2007) ("Although some respondents had access to informal care, they often did not want to rely on these individuals."); Margaret A. Nosek & Carol A. Howland, *Personal Assistance Services: The Hub of the Policy Wheel for Community Integration of People with Severe Physical Disabilities*, 21 Pol'y Stud. J. 789, 791 (1993) (stating that reliance on family members as personal assistants "may cause role overload or a mixing of roles that can strain relationships to the breaking point" and that it is therefore "not safe to assume that family will always provide the best assistance").

[9] See, *e.g.*, Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 Vand. L. Rev. 745, 795 (2007).

[10] Cf. Benjamin & Matthias, *supra*, at 636 (reporting that older users of consumer-directed services are more likely to choose to hire a relative).

that diverse individuals will find the right provider match, and enhances independence.

B. Sharing the Role of Employer Serves the Goals of Independent Living

Illinois's Medicaid program provides for personal assistance services "to prevent unnecessary institutionalization" and to "enabl[e]" eligible individuals with disabilities "to remain in their own homes or other living arrangements." 20 ILCS § 2405/3(f). Adopting a relationship that is common in the staffing-services and other industries, Illinois law allocates different aspects of the employer's role to the state and to the individual consumer. In keeping with the principles of independent living, Illinois law provides that the individual consumer with a disability has the power "to hire and fire" his or her own personal assistant, as well as to direct the tasks performed by that assistant on a day-to-day and minute-to-minute basis. *Id.*[11] But the law also provides that personal assistants shall be entitled to select a bargaining representative who engages in collective bargaining with the state concerning other "terms and conditions of employment that are within the State's control." *Id.*

Illinois's arrangement is similar to arrangements a number of other states have adopted for personal

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[11] The personal assistant must meet certain state-imposed standards to be eligible for hire or continued employment. See 89 Ill. Admin. Code §§ 677.40, 686.10.

assistants hired under their Medicaid programs.[12] In Illinois as in these other states, the arrangement resulted from negotiations and discussions between the state, workers' advocates, organizations representing consumers with disabilities, and other stakeholders.[13] The sharing of the employer role serves a key function in ensuring that Medicaid-funded personal assistance services in fact advance the goals of independent living.

These arrangements provide that, although the state pays the personal assistant's wages and controls

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[12] See Cal. Welf. & Inst. Code § 12301.6; Conn. Gen. Stat. § 17b-706 *et seq.*; Md. Health-Gen. Code § 15-901 *et seq.*; 118E Mass. Gen. L. § 70 *et seq.*; Minn. Stat. § 179A.50 *et seq.*; Mo. Rev. Stat. § 208.856 *et seq.*; Or. Const. Art. XV, § 11; Or. Rev. Stat. § 410.595 *et seq.*; 21 Vt. Stat. Ann. § 1631 *et seq.*; Rev. Code Wash. § 74.39A.220 *et seq.*

[13] See Eileen Boris & Jennifer Klein, Caring for America: Home Health Workers in the Shadow of the Welfare State 195-196, 215 (2012); Nari Rhee & Carol Zabin, *The Social Benefits of Unionization in the Long-Term Care Sector*, in Academics on Employee Free Choice: Multidisciplinary Approaches to Labor Law Reform 83, 85 (John Logan, ed., 2009). See also Patrice M. Mareschal, *Innovation and Adaptation: Contrasting Efforts to Organize Home Care Workers in Four States*, Lab. Stud. J., Mar. 2006 at 25, 28-29 (describing how California's arrangement resulted from a coalition between the Service Employees International Union and "major senior and disability IHSS consumer groups, namely the California Foundation of Independent Living Centers and the California Senior Legislature"); Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, Lab. Stud. J., Mar. 2002 at 1, 11-14 (same); Rivas, *supra* (same).

other terms and conditions of employment, the individual consumer with a disability has the power to hire, fire, and supervise the person who provides assistance to her. See Benjamin I. Sachs, *Labor Law Renewal*, 1 Harv. L. & Pol'y Rev. 375, 386 (2007) ("Reflective of the nature of the services provided by home care workers * * * , decisions regarding the hiring, firing, and supervision of workers are often reserved [under these bargaining arrangements] for the consumers of home care services * * * . Thus, such decisions may not be the subject of collective bargaining between workers and the public authorities."). Some consumers choose to provide their own training to assistants to ensure that the services fit the individual consumer's unique needs and preferences. Some programs, although not Illinois's, offer eligible consumers the option to take responsibility for payments to providers to maximize flexibility in managing their own services.[14] For purposes of those key aspects of the employment relationship – which directly advance the goals of independent living – the consumer is properly regarded as an employer of the personal assistant.

But there are other key terms and conditions of employment that many individual consumers – whether or not they had disabilities – would be unlikely to be able to provide themselves. In Illinois,

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[14] See, *e.g.*, Cal. Welf. & Inst. Code § 12304 (giving eligible individuals with disabilities the option of advance cash payments for in-home services).

the state has retained the power to set workforce-wide terms and conditions like these, including: the setting of wages; the provision of benefits (such as health insurance and paid time off), which cannot be easily managed on a one-on-one basis; and the creation and management of systems for identifying prospective personal assistants, matching them with consumers willing to hire them, and administering payroll and tax matters. As one study found, "although [personal assistance services] recipients want to self-direct their supportive services, they generally report that the numerous employer-related fiscal/administrative tasks are onerous." Teresa Scherzer, Alice Wong & Robert Newcomer, *Financial Management Services in Consumer-Directed Programs*, 26 Home Health Care Services Q. 29, 32 (2007). And many consumers report difficulties in soliciting, screening, and sorting applications for personal assistant positions. See Grossman et al., *supra*, at 37.

Because those aspects of the employment relationship cannot easily be managed by an individual consumer, the personal assistant workforce has proven unstable. "Consumers of PAS consistently report difficulty in recruiting and retaining personal assistants." Stout et al., *supra*, at 45 (citation omitted). Many commentators have noted the "unacceptably

high rates of vacancies and turnover" among personal assistants. Rhee & Zabin, *supra*, at 84.[15]

As a result, many individuals with disabilities have been unable to obtain the services and supports that will promote their independence. Not only have individual consumers been unable to find personal assistants available for hire,[16] turnover among providers has also had "a profoundly negative effect on consumers' ability to achieve full community integration." Stout et al., *supra*, at 45. Turnover among personal assistants increases the risk that individuals with disabilities will be reinstitutionalized. See Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1395 (2008). Even in the best case, turnover requires consumers to bear the burden of continually training new personal assistants. See Charlene Harrington, Terence Ng, Stephen H. Kaye & Robert Newcomer,

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[15] See *id.* at 84-85 (noting that "[t]urnover rates range from 41 percent per year to over 71 percent per year in community settings," and "80 to 90 percent of home-health aides leave their jobs within the first two years; 40 to 60 percent leave after less than one year"); Grossman et al., *supra*, at 36 ("Most respondents [to a survey of consumers] pointed out the problems in obtaining [personal assistance] providers because of the shortage of workers.").

[16] See RTZ Associates, Inc., *Impact of Health Benefits on Retention of Homecare Workers: A Two-Year Study of the IHSS Health Benefits Program in Los Angeles County* 13 (2004).

Home and Community-Based Services: Public Policies to Improve Access, Costs, and Quality (2009).[17]

The arrangements adopted by Illinois and other states represent an effort to solve this problem. Under these arrangements, the state controls the more systematic aspects of the employment relationship, which many individual consumers will have difficulty managing for themselves. When a representative selected by personal assistants negotiates with the state over those terms and conditions of employment, it is not engaged in "lobbying." Cf. Pet. Br. 40. Rather, it is engaged in activity at the core of collective bargaining – negotiating a contract with the entity that controls key terms and conditions of employment. See *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2294 (2012) (reaffirming "the important difference between a union's authority to engage in collective bargaining and related activities on behalf of nonmember employees in a bargaining unit and the union's use of nonmembers' money 'to support candidates for public office' or 'to support political causes which [they] oppos[e].'") (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768

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[17] See also Robyn I. Stone, *The Direct Care Worker: The Third Rail of Home Care Policy*, 25 Ann. Rev. Pub. Health 521, 525 (2004) (noting that "problems with attracting and retaining direct care workers may translate into poorer quality and/or unsafe care, major disruptions in the continuity of care, and reduced access to care" and that "reduced availability and frequent churning of home care workers may affect clients' physical and mental functioning").

(1961); alterations in *Knox*). This collective bargaining takes place with the state, which is the employer that has authority over such core terms and conditions of employment as wages and benefits, while state law gives individual consumers the authority of employer for purposes of the decisions to hire, fire, and supervise the individuals who personally provide them services.

Adoption of this shared employment relationship promotes the goal of consumer control while helping to ensure that a stable and fairly compensated workforce of personal assistants will exist. Indeed, the sharing of the employer role responds directly to concerns expressed by disability rights activists. In California, for example, major organizations of people with disabilities insisted on provisions that retained consumer control in significant respects, by reserving for consumers the power of hiring, firing, and supervision, and by requiring that consumers represent a majority of the members of the board of each public authority (the agency that is the employer of record for collective-bargaining purposes).[18] As we have

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[18] See Cal. Welf. & Inst. Code § 12301.6(c); Rivas, *supra*, at 6-9. See also Rhee & Zabin, *supra*, at 86 (noting that these reforms "preserved consumer choice in hiring and firing their own support workers"); Mareschal, *supra*, at 29 (explaining that under the California arrangement "consumers retained their right to hire, supervise, and fire their home care aides" and also "gained a voice in the administration of the IHSS program").

shown, Illinois and other states similarly promote consumer control.[19]

But disability rights activists also recognized that much of the instability in the personal assistant workforce related to terms and conditions that individual consumers were unlikely to be able to affect. And they understood that collective bargaining between the workers and the state, which controlled *those* terms and conditions, could aid consumers. For example, many observers attribute the high degree of turnover among personal assistants to low wages and benefits (including inadequate health insurance coverage).[20] But it is the state, not individual consumers,

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[19] See 20 ILCS § 2405/3(f). See also Conn. Gen. Stat. § 17b-706a(e)(2)(A); Md. Health-Gen. Code § 15-907(b); 118E Mass. Gen. L. § 73(a); Minn. Stat. § 179A.54, Subd. 4; Mo. Rev. Stat. § 208.862.1; Or. Const. Art. XV, § 11(3)(c); 21 Vt. Stat. Ann. § 1640(a); Rev. Code Wash. § 74.39A.270(4).

[20] See Rhee & Zabin, *supra*, at 84; Alison Ashley, Sandra S. Butler & Nancy Fishwick, *Home Care Aides' Voices from the Field: Job Experiences of Personal Support Specialists – the Maine Home Care Worker Retention Study*, 7 Home Healthcare Nurse 399 (2010). See also Rivas, *supra*, at 3 ("One of the most intractable problems was the level of compensation received by personal attendants which, until the recent collaboration with the Service Employees International Union (SEIU), was rarely higher than minimum wage. While the low wages created hardship for the workers, consumers also found it difficult to attract and retain attendants with such low wages.") (footnotes omitted); Kristin Smith & Reagan Baughman, *Caring for America's Aging Population: A Profile of the Direct-Care Workforce*, Monthly Lab. Rev., Sept. 2007, at 20 (describing the personal-assistant workforce as "a low-wage workforce with correspondingly low levels of health insurance coverage and

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that has control over these aspects of the employment relationship. Allowing personal assistants to bargain collectively with the state over those terms and conditions of employment could be expected to lead to increased wages and benefits, and decreased turnover – with the result of promoting the independence of individuals with disabilities who use assistance services. The evidence suggests that is exactly what has happened. Illinois's arrangement and similar ones in California, Washington, Massachusetts, and Oregon have led to "substantial gains in wages and benefits" for personal assistants.[21] And "available research indicates that wage and benefit increases due to collective bargaining have led to significantly lower worker turnover, greater availability of qualified

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high levels of turnover"); Grossman et al., *supra*, at 37 (consumers surveyed "attributed the shortage of workers and the high turnover rates to inadequate wages (ranging from $7-$10 per hour) and benefits paid by public [personal assistance services] programs"); H. Stephen Kaye, Susan Chapman, Robert J. Newcomer & Charlene Harrington, *The Personal Assistance Workforce: Trends in Supply and Demand*, 25 Health Aff. 1113, 1114 (2006) (noting that "low wages, scarce health benefits, and irregular work schedules" for personal assistants "make it problematic to attract and retain qualified workers"); Stone, *supra*, at 522 (arguing that "low" wages and "inadequate" benefits "contribute to high vacancy and turnover rates among direct care workers").

[21] Rhee & Zabin, *supra*, at 87. See Smith, *supra*, at 1413 (describing significant wage and benefits gains for personal assistants following adoption of these arrangements in Illinois, Oregon, and Washington State); Sachs, *supra*, at 387 (describing significant wage gains for personal assistants following adoption of these arrangements in Illinois, California, and Oregon).

workers, and shorter gaps in services for consumers."[a]

But it is not just wages and benefits for which personal assistants may have an interest in bargaining collectively. As noted above, many consumers find it difficult to solicit, sort, and select applicants for personal assistance jobs. Personal-assistance workers share an interest in identifying consumers who will hire them. Workers in California, Oregon, and Washington have used their collective bargaining rights to negotiate over the design of referral registries, which facilitate matching between workers and consumers. As one study of the attitudes of personal assistance consumers found, many (though not necessarily all) consumers welcome the implementation of registries like these, because they make it easier for consumers to find and hire assistants who fit their needs and

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[a] Rhee & Zabin, *supra*, at 91. See Candace Howes, *Upgrading California's Home Care Workforce: The Impact of Political Action and Unionization*, in The State of California Labor, 2004 at 71 (Ruth Milkman, ed., 2004) (finding that unionization of personal assistants in California (under an arrangement similar to Illinois's) led to improvements in wages and benefits and reduction in turnover); Nancy Folbre, *Demanding Quality: Worker/Consumer Coalitions and "High Road" Strategies in the Care Sector*, 34 Pol. & Society 1, 14 (2006) (noting that unionization of personal assistants in California and Oregon (under arrangements similar to the Illinois arrangement challenged here) "clearly improved wages and benefits, and also gave clients greater choice of caregivers"); RTZ Associates, Inc., *supra* (finding that the adoption of health care benefits for personal assistants pursuant to a collective bargaining arrangement like the one at issue here reduced worker turnover).

desires.[23] Both consumers and workers can also benefit from the creation of intermediaries that can manage some of the fiscal/administrative tasks that many (though not all) individual consumers find difficult to handle for themselves. See Harrington et al., *supra*. Because no individual consumer could set up a registry or intermediary, personal assistants must bargain with the state if they are to have a voice over these aspects of their employment. And collective bargaining, by promoting the creation of these entities, can serve the interest of both workers and consumers.

Finally, and perhaps most importantly, collective bargaining channels disputes over the terms and conditions of personal-assistance employment into the peaceful forum of a negotiating table. Consumers with disabilities and the workers who provide personal assistance do not agree on all issues relating to the terms and conditions of employment, but they do share an interest in providing a mechanism for peaceful resolution of disputes. Particularly given the essential contribution of personal assistance to the independence, integration, and freedom from institutionalization of people with disabilities, labor strife

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[23] See Grossman et al., at 37 ("A number of respondents suggested that a registry of available [personal assistance services] providers should be created and managed by either the state or a local program. A registry could make the search for providers less work intensive and less costly (i.e., not having to place advertisements in local newspapers), especially in rural communities.").

among the personal-assistant workforce could have profoundly negative consequences for consumers. It is notable in this regard that consumers have insisted, in a number of the collective bargaining regimes in this context, that personal assistants not be entitled to strike to obtain a bargaining advantage. See Rivas, *supra*, at 6-9; Sachs, *supra*, at 386.[24] By acceding to that insistence, the states have ensured that disputes over the terms and conditions of personal assistants' employment will not be disruptive of the lives and independence of people with disabilities. The state's interests in "maintaining peaceful labor relations," which this Court has held sufficient to justify an agency-fee regime, *Locke*, 555 U.S. at 213, take on heightened importance in this context.

The sharing of the employer role under Illinois's collective-bargaining arrangement for personal assistants thus directly serves the goals of independent living and consumer control for which disability rights activists have fought. Whether or not the arrangements set up by Illinois and other states would make the state an employer for purposes of the common law or federal statutes – an issue that is not presented in this case – those arrangements properly authorize

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[24] See Md. Health-Gen. Code § 15-906; 118E Mass. Gen. L. § 73(d); Mo. Rev. Stat. § 208.862.6; Or. Const. Art. XV, § 11(3)(f); 21 Vt. Stat. Ann. § 1637(c)(4), (d); Rev. Code Wash. § 74.39A.270(2)(d). The collective bargaining agreement for Illinois personal assistants, available at http://goo.gl/twJDGP, contains a no-strike clause (Art. XII § 5).

personal assistants to engage in collective bargaining with the state over the terms and conditions of employment that the state manages, while empowering individual consumers to choose their own assistants and direct them on a day-to-day basis. Because the workers under this arrangement bargain collectively with the state over terms and conditions of employment, an agency-fee regime is constitutional under this Court's First Amendment cases. See *id.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Alphabetical List of *Amici*

Access Living is a Center for Independent Living in Chicago, Illinois, that serves and represents persons with disabilities. A cross-disability organization governed and staffed by a majority of people with disabilities, Access Living traces its roots to the independent living movement that began in the early 1970s. The independent living movement has as its fundamental principle that people with disabilities are entitled to the same civil rights, options and control over choices in their own lives as people without disabilities. Access Living provides personal assistant training and instruction and empowers consumers to hire, fire, and supervise the daily work of their personal assistants. Many of Access Living's clients directly benefit from consumer-directed services and the advantages of collective bargaining. Given its role, Access Living has a significant interest in the outcome of this litigation.

The mission of the **AIDS Foundation of Chicago (AFC)** is to lead the fight against HIV/AIDS and improve the lives of people affected by the epidemic. Founded in 1985 by community activists and physicians, AFC is a local and national leader in the fight against HIV/AIDS. AFC collaborates with community organizations to develop and improve HIV/AIDS services; fund and coordinate prevention, care, and advocacy projects; and champion effective, compassionate HIV/AIDS policy. The **AIDS Legal Council of Chicago (ALCC)** exists to preserve, promote and protect the legal rights of men, women and children

in the metropolitan Chicago area impacted by HIV. The Council provides direct legal services to people in need, educates the public about HIV-related legal issues, and advocates for social policies that ensure fair treatment for all people affected by HIV/AIDS. For the past two decades, AFC has administered the AIDS waiver on behalf of the Illinois Department of Rehabilitative Services (DRS). The AIDS waiver is a home and community-based waiver program that offers additional services to those living with symptomatic HIV or AIDS, in order to provide an alternative to hospitalization or institutional care. Today the AIDS waiver assists nearly 1,000 severely ill individuals and prevents institutionalization with the delivery of essential AIDS specialty community-based services. Personal assistants are an essential component to the effective coordination and operation of the program. A well-educated and trained personal assistant workforce assist clients in striving toward care and treatment adherence, self-management, and full independence.

The **American Association of People with Disabilities (AAPD)**, founded in 1995 and headquartered in Washington, D.C., is the largest national nonprofit disability rights organization in the United States. AAPD promotes equal opportunity, economic power, independent living, and political participation for people with disabilities. Its members, including people with disabilities and family, friends, and supporters, represent a powerful force for change. AAPD advocates for federal policy that expands

access to Medicaid funded home and community-based services, which includes incentives for states to expand access to these critical community living services. Advocating and promoting the adoption of joint-employer model by states which allow individuals to direct their Medicaid personal assistance services advances the independent living interest of people with disabilities. AAPD and its members benefit from a stable and appropriately compensated workforce who provide Medicaid personal assistance services and thus have a direct interest in the outcome of this litigation.

The **Boston Center for Independent Living (BCIL)**, founded in 1974, annually provides services to approximately 4,000 people with disabilities, assisting individuals to secure affordable housing, obtain benefits, get jobs, and address health care needs, among many things. As a Personal Care Management agency funded by the Massachusetts Medicaid program, BCIL assists over a thousand individuals to receive and manage their personal care attendant (PCA) services. This program has often been called "the most important independent living program there is" for people with disabilities needing assistance with activities of daily living. BCIL also advocates on issues of concern to the state's disability community, giving top priority to issues surrounding the PCA program. Critical to sound operation of a program now serving over 27,400 consumers statewide is a stable, adequately compensated workforce.

This is inextricably tied to the care and independence of those on the PCA program.

The **California Alliance for Retired Americans (CARA)** is California's largest, grassroots senior advocacy organization, representing over 950,000 seniors through our 250 affiliated organizations. CARA works on issues to improve the quality of life for seniors and their families, and is the state affiliate of the 4 million member national organization, the Alliance for Retired Americans. CARA advocates for the creation of a rational system for providing long-term services and supports so people can remain living safely in their home and in the community. This system must provide quality care for consumers of long-term services and quality jobs for the people who provide those services. In order to create quality jobs including health benefits, screening, and registry services, CARA supports a joint consumer-employer model for providing long-term services and supports and has a direct interest in the outcome of this litigation.

The **Center for Medicare Advocacy, Inc.**, provides information, education, and representation to older people and people with disabilities regarding fair access to Medicare and health care. The Center's work involves responding to over 7,000 calls and e-mails annually, producing educational materials, pursuing Medicare coverage for beneficiaries, and engaging in litigation of national significance – with a particular emphasis on issues of import to people with low incomes and long-term conditions. The

Center has a substantial interest and expertise in ensuring that due process and access to necessary, quality care are available to people with Medicare, Medicaid, and disabilities.

The **Congress of California Seniors (CCS)**, founded in 1977 and headquartered in Sacramento, California, is the most active senior advocacy and outreach organization in the state and one of the largest in the nation. CCS promotes public and private efforts to ensure that seniors and people with disabilities live in security and dignity and in the least restrictive environment of their choice. CCS encourages equal opportunity, economic power, independent living, and active public participation for seniors and people with disabilities. Over many years, CCS's members and affiliates, including seniors and their families, friends, providers, and supporters, have become a respected and powerful force for positive change. CCS advocates for state and federal budgets, laws, and policies that expand access to home and community-based services, which includes incentives for states to expand access to these critical community living services. The Congress of California Seniors and its members benefit from a stable and appropriately compensated workforce who provide Medicaid (Medi-Cal) personal assistance services and CCS, therefore, has a direct interest in the outcome of this litigation.

The **Disability Law Center (DLC)** is a statewide private nonprofit organization and the designated Protection and Advocacy ("P&A") system for the

Commonwealth of Massachusetts. As such, it operates under a federal mandate to protect and advocate for the rights of individuals with disabilities and to assist in educating policymakers. The mission of DLC is to provide legal advocacy on disability issues to promote the rights of people with disabilities to participate fully and equally in the social and economic life of Massachusetts. In pursuit of its mission, DLC has worked to expand and strengthen home and community-based services needed to allow individuals with disabilities to live and work independently in the community. Personal care attendant ("PCA") services are often critical for DLC clients to have meaningful lives and avoid unnecessary segregation and institutionalization. To prevent any interruption of PCA services, which may jeopardize jobs, family relationships and independent living, DLC has worked to promote an organized, more stable and higher paid PCA workforce for its constituents. DLC has participated in policy advocacy related to the working conditions and oversight of the PCA program, which now includes union representation of 32,000 Massachusetts PCAs.

The **Disability Policy Consortium (DPC)** is the largest cross-disability advocacy organization in Massachusetts. DPC's mission is to advocate for the full equality of and inclusion of people with disabilities into all aspects of our society. Many of its members are users of Personal Care Attendant services and have a profound interest and stake in the outcome of this case. Prior to Massachusetts's creation of

a collective-bargaining regime for Personal Care Attendants, wages were low and the hiring of qualified attendants was difficult. Because of low wages, DPC members were competing with fast food franchises and retailers for providers of care. Because of the intimate and personal nature of the work, finding reputable, caring and sensitive employees is critical. This need combined with the low wage often put people with disabilities in untenable situations. Since unionization, wages have risen by more than 28% to $12.98 per hour. This change has resulted in improved care for people living in the least restrictive environment, thus realizing the vision articulated in the *Olmstead* decision.

The **Disability Rights Education & Defense Fund (DREDF)**, based in Berkeley, California, is a national nonprofit law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the community it represents. Recognized for its expertise in the interpretation of federal and California disability civil rights laws, DREDF pursues its mission through education, advocacy and law reform efforts.

Disability Rights Oregon (DRO) is the Protection and Advocacy organization for Oregon. In this capacity, DRO advocates for safe, high quality community-based services for Oregonians with disabilities. These are services that are not only desired by DRO's clients

but also respect their rights under the Americans with Disabilities Act to receive publically funded services in the most integrated, appropriate settings. Oregon has a system like that in Illinois for the screening, certification, training and compensation of personal assistants who are hired, fired and directed by the recipients of those services. This structure has been in place for over ten years and has resulted in a more stable and competent workforce. A decision in this case that upsets Oregon's system would hurt the ability of DRO's clients to remain in their homes and communities with safe and competent assistance.

Easter Seals Massachusetts is a statewide, community-based organization that takes pride in its nearly 70 year history of assisting people of all ages to live full, independent and enriched lives. Easter Seals Massachusetts believes in the philosophy of independent living. Its mission is to provide services to ensure that children and adults with disabilities have equal opportunities to live, learn, work and play. Since its founding in 1944, Easter Seals has sustained an unwavering presence and maintained a resolute focus on its vision – that people with disabilities are empowered to reach their full potential. Easter Seals Massachusetts is governed by a locally-elected Board of Directors whose membership includes people with disabilities as well as parents of children with disabilities. Easter Seals Massachusetts advocated for the Massachusetts law, similar to the Illinois law under challenge here, that creates a collective bargaining arrangement for the individuals

who provide consumer-directed personal assistance services.

Equip for Equality (EFE), founded in 1985, is an independent, not-for-profit organization that administers the federally mandated protection and advocacy services in Illinois. EFE's mission is to advance the human and civil rights of children and adults with physical and mental disabilities in Illinois. One of the statutory mandates under which EFE operates is the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq*. A primary goal of the Act is to "provid[e] individuals with developmental disabilities with the information, skills, opportunities, and support to . . . live in homes and communities in which such individuals can exercise their full rights and responsibilities as citizens." 42 U.S.C. § 15001(16). Over the years, EFE has worked to effectuate this goal in Illinois by handling hundreds of cases on behalf of people with developmental disabilities seeking to live in the most integrated setting. EFE also is lead counsel in *Ligas v. Hamos*, a class action on behalf of thousands of people with disabilities living in institutions, or at risk of institutionalization, who are seeking community services. EFE also works to promote safe and effective community services through its public policy advocacy and its statutorily mandated monitoring activities, and supports efforts to increase resources for community-based services, including higher wages for community service providers. Because of EFE's expertise in working with people with developmental

disabilities, it has critical information and an important perspective to provide to the Court.

The **Health and Medicine Policy Research Group (HMPRG)** is a 30-year-old research and advocacy institute with a focus on Illinois public health and care for the poor and underserved. Through its Center for Long-Term Care Reform, HMPRG has played a leadership role in the balancing of long-term care services in support of culturally competent, high quality, and predominantly home-based long-term care for seniors and people with disabilities. HMPRG has built relationships with consumers, advocates for seniors and people with disabilities, policy makers, and labor organizations to pursue policies that enhance access to quality services, independent living, consumer direction, and a stable, fairly-compensated workforce in Illinois's long-term care system.

The **Illinois Network of Centers for Independent Living (INCIL)** is the statewide association whose members are the 22 Centers for Independent Living (CILs) in Illinois. INCIL advocates for full civil rights for people with disabilities, including the right to live in the community rather than in institutions, and to receive necessary supports and services in their homes. The services provided by home and community-based personal assistants (PAs) in Illinois are crucial to each consumer's ability to remain independent. Under Illinois law, consumers are entitled to hire, train, supervise and, if necessary, fire personal assistants of their choice, empowering them

to exercise full control over their supports and services. The state is the employer of record, managing payroll and taxes for PAs employed by consumers. This also allows PAs to organize for the purpose of collective bargaining, which has brought about reasonable wages and related benefits such as health care coverage. This in turn has developed a workforce of reliable and committed personal assistants who provide the quality of services so essential to independence. INCIL has a direct interest in maintaining the right of home and community-based personal assistants to have representation for collective bargaining so that this exemplary program will remain high quality and continue to assure the civil rights of people with disabilities.

The **Independent Living Center of the North Shore and Cape Ann, Inc. (ILCNSCA)** is the service and advocacy agency run by and for people with disabilities of all types and of all ages who live and work in the 25 municipalities from Melrose to Rockport, Massachusetts. ILCNSCA has consistently been successful in guiding many to live more independently, and for the community to be more inclusive of all, especially of those of us living with significant disabilities. ILCNSCA has assisted many individuals to leave skilled nursing facilities and live more independently with their chosen services and supports in their community. Many use consumer-directed Personal Care Attendant services. ILCNSCA is very concerned that without a trained, dynamic, competent and expanding workforce, PCA workers

will not be available to those of us who do not want to be in skilled nursing facilities. As advocates for independent living, choice, consumer control, and dignity of risk, ILCNSCA sees that the model developed in Massachusetts with a PCA Work Force Council consisting of consumer/employers, state government (funders), and a union is necessary for those of us who use PCA services to maintain our freedom.

The **Judge David L. Bazelon Center for Mental Health Law** is a national nonprofit advocacy organization that provides legal assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, training and education, the Center promotes the rights of individuals with mental disabilities to participate equally in all aspects of society, including housing, employment, education, health care, community living and other areas. The Center has devoted much of its resources to ensuring that individuals with disabilities have opportunities to live in their own homes with the services necessary to succeed. It has litigated numerous cases to enforce the ADA's integration mandate and the Olmstead decision, has engaged in policy advocacy to promote the availability of services that enable individuals with disabilities to live in their own homes, and has served as a resource for lawyers and advocates addressing these issues across the country.

The **National Consumer Voice for Quality Long Term Care** (formerly NCCNHR) was formed in 1975

to advocate for quality for people with long-term care needs. The Consumer Voice advocates for public policies that support quality care and quality of life responsive to consumers' needs in all long-term care settings; empowers and educates consumers and families with the knowledge and tools they need for self-advocacy; trains and supports individuals and groups that empower and advocate for long-term care consumers; and promote the critical role of direct care workers and best practices in quality care delivery. The Consumer Voice has long held that a strong, stable, well-trained workforce is critical for quality of care and quality of life for individuals receiving long-term services and supports.

The **National Council on Aging (NCOA)** is the nation's leading nonprofit service and advocacy organization representing older adults and the community organizations that serve them. Its goal is to improve the health, independence, and economic security of 10 million older adults by 2020. For more than 60 years, NCOA has been a trusted voice and innovative problem-solver helping seniors navigate the challenges of aging in America. NCOA works with local and national partners to give older adults tools and information to stay healthy and secure, and it advocates for programs and policies to improve the lives of all seniors and people with disabilities, especially the most vulnerable. NCOA works closely with disability organizations and organizations representing direct care workers. It leads a collaborative of 38 national aging and disability organizations working

together to advance long-term services and supports policy. NCOA strongly supports options for self-direction, access to home and community-based services, and the availability of an adequate direct care workforce to meet current and future needs for long-term services and supports as our population ages.

The **National Senior Citizens Law Center (NSCLC)** is a nonprofit organization that advocates for the independence and well-being of low-income older persons and people with disabilities. For more than 40 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to legal aid attorneys and other local advocates. Our goal is to strengthen the public benefits programs that allow low-income older adults to live with dignity and independence. NSCLC has participated as class counsel in numerous lawsuits to preserve or expand older adults and persons with disabilities' access to Medicaid, including representing self-directing consumers of personal care services in California, where provider wages and benefits are subject to collective bargaining.

For more than a quarter century, **Puget Sound Advocates for Retirement Action (PSARA)** has been active in fighting for older Americans, their children and their families. PSARA's efforts are based on the belief that seniors, our children and grandchildren need and deserve a lifelong, adequate, dependable income; comprehensive, affordable health care, including prescription drug coverage; taxes and

utility bills we can handle; access to affordable housing, transportation, and social services; support for our family caregiving responsibilities; and quality time to relax and enjoy life with family and friends. Tens of thousands of Washington's seniors depend on Washington's Medicaid home care program to live independently and with dignity in their homes and communities. PSARA members benefit from a well-trained, well-compensated and stable workforce to provide this vital service and therefore have a direct interest in this case.

The **Sargent Shriver National Center on Poverty Law (Shriver Center)** is a proponent of anti-poverty measures and focuses on policy and legal matters in housing, health care, employment, public benefits, criminal justice, and education. Advocating for efforts to increase and maintain access to quality health care is critical to the Shriver Center's multi-pronged approach to decrease poverty and its impact on communities. As part of these efforts, the Shriver Center supports collective bargaining, which results in a more stable personal assistant workforce for Medicaid recipients, particularly for persons with disabilities. These resources increase opportunities for individuals facing economic challenges to make better lives for themselves and their families. The Shriver Center supports Respondent's arguments and has a compelling interest in the outcome of this case.

Stavros Center for Independent Living, Inc., serves more than 6,000 persons with disabilities each

year in the western Massachusetts counties of Franklin, Hampden, and Hampshire. Founded in 1974, Stavros was the third independent living center to be established in the United States. Central to its work – through the provision of personal care attendant services (3,800 people), nursing home transition services (about 40 each year), ramp construction (about 50 each year), and the refurbishing and recycling of durable medical equipment (about 500 pieces of equipment each year) – is helping people live in their own homes. Stavros has learned from experience that for many, many disabled individuals real freedom depends on the availability of personal care attendants, and that this, in turn, depends on a well-compensated and well-trained workforce. For the disability community, the availability of good and reliable attendants promotes access to jobs, education, and participation in all aspects of life, as well as health and safety.

United Spinal Association is the largest disability-led nonprofit organization serving and representing the interests of more than a million Americans living with spinal cord injuries and disorders (SCI/D). Founded in 1946 by paralyzed veterans, it has approximately 40,000 members in all 50 states and reaches out to these individuals through 42 chapters and 200 support groups. Throughout its history, United Spinal Association has dedicated its energy and programs to improving the quality of life for these Americans of all ages and advancing their independence. Many of United Spinal Association's

members rely on quality personal assistant services to participate fully in their communities and live in the settings they choose.

The **Washington Association of Area Agencies on Aging (W4A)** is a membership organization made up of 13 Area Agencies on Aging (AAA) in Washington State. The organization seeks to enhance the effectiveness of each AAA through a strong agenda of information, debate, advocacy and education. The Area Agencies on Aging directly provide services and supports to elders and adults with disabilities including case management, information and assistance, community living connections, and family caregiver supports and services. The AAAs also contract with a wide range of community agencies and organization providing services to the elderly and younger people with disabilities. W4A members work directly with Washington's home care aides to provide quality in-home services to seniors and people with disabilities. W4A has a direct interest in this case because of the potential impact on Washington's successful home and community-based long-term care system.

The mission of the **World Institute on Disability (WID)** in communities and nations worldwide is to eliminate barriers to full social integration and increase employment, economic security and health care for persons with disabilities. WID creates innovative programs and tools; conducts research, training, public education and advocacy campaigns; and provides technical assistance. An internationally recognized public policy center founded in 1983 by

three leaders of the Independent Living Movement – Ed Roberts, Judy Heumann, and Joan Leon – WID's program work focuses on issues and problems that directly affect people's ability to live full and independent lives. A majority of WID's board and staff are persons with disabilities.

AMICUS CURIAE BRIEF

FOR ARGUMENT

Supreme Court, U.S.
FILED
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No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,
Petitioners,
v.
PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of 12 million working men and women.[1] This case addresses the constitutionality of contract clauses that require public employees who benefit from union representation to share the costs of negotiating and enforcing collective bargaining agreements. Many AFL-CIO affiliates represent public employees and negotiate collective bargaining agreements containing clauses that require the covered employees to financially support collective bargaining.

STATEMENT

Personal assistants employed in the Illinois Home Services Program provide in-home care to individuals with disabilities in return for hourly wages and fringe benefits that are set and paid by the State of Illinois and not by the individuals receiving care. Pet. App. 3a. The State not only sets the hourly wage rate but also the number of hours the personal assistants work. 89 Ill. Admin. Code § 686.10(h)(2). The State specifies both the general categories of

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[1] Counsel for the petitioners and counsel for the respondents have consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

services personal assistants can provide, *id.* § 686.20, as well as the precise services specific personal assistants must provide individual customers together with the frequency and the time allowed for each task, *id.* § 684.50. In addition to establishing the personal assistants' rate of compensation, benefits package, hours, and tasks, the State establishes minimum, required qualifications for the job. *Id.* § 686.10. Subject to approval by the State, personal assistants enter into State-prescribed service contracts with the individuals receiving in-home care. *Id.* § 677.200(g). The State requires that personal assistants' work hours be recorded in a form that is specified by and must be submitted to the State. *Id.* § 686.10(h)(2). The State also requires that personal assistants' performance be evaluated annually on a State-provided form that must be submitted to the State. *Id.* § 686.30. Finally, the State can terminate a personal assistant for specified forms of misconduct, including failure to perform the State-specified tasks. Illinois Department of Human Services, *Customer Guidance for Managing Providers* 8.

The Illinois Public Labor Relations Act (IPLRA) allows personal assistants to engage in collective bargaining with the State over those terms and conditions of employment controlled by the State. 5 ILCS 315/7. To engage in collective bargaining, a majority of the personal assistants in an appropriate unit select an exclusive bargaining representative. 5 ILCS 315/3(f). Any agreement reached between the State and an exclusive representative must provide for final and binding arbitration to resolve all disputes under the agreement. 5 ILCS 315/8.

In negotiating and enforcing the agreement, the exclusive representative has a duty to fairly represent all employees in the bargaining unit, regardless of whether they are members of the union. 5 ILCS 315/6(d). The exclusive representative and the State may include a "fair share" provision in the agreement requiring all covered employees to pay the representative a fee covering their share of the costs of representation. 5 ILCS 315/6(e). Where a "fair share" provision has been negotiated, the exclusive representative certifies to the State the amount constituting each employee's proportionate share of the costs of representation, and that amount is deducted from the collectively-bargained wages of those employees who are not otherwise paying full membership dues to the representative and transmitted to the representative. *Ibid.*

Several of the petitioners are personal assistants covered by a collective bargaining agreement containing a "fair share" provision. Pet. App. 5a. The covered petitioners brought suit claiming that the requirement to pay fair share fees violates the First Amendment. *Id.* at 6a. The petitioners sought an injunction against being required to provide support to any exclusive representative. Complaint Prayer for Relief ¶ A (1) & (2). In addition, they sought to have the fair share provision in the collective bargaining agreement declared void and to have the fair share fees that had been deducted from their wages by the State returned to them. *Id.* ¶s A (3) & C (1). The petitioners have not sought to strike down any other provision of the agreement, most particularly, the negotiated wage scales and benefit provisions that have provided the unit with annual wage increases and valuable fringe benefits.

The courts below found it dispositive that the petitioners "do not allege that the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining" and that "[t]he Supreme Court has long approved collective bargaining agreements that compel even dissenting, nonunion members to financially support the costs of collective bargaining." Pet. App. 7a. *See also id.* at 35a ("Plaintiffs have not alleged that the exclusive representation system here has imposed any burden on Plaintiffs beyond supporting the collective bargaining arrangement from which they benefit."). Finding this Court's decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to be controlling, the courts below concluded that "the State may compel the personal assistants . . . to financially support a single representative's exclusive collective bargaining representation." Pet. App. 13a-14a.

SUMMARY OF ARGUMENT

This Court's decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), hold that requiring employees to contribute financial support to the costs of representation in collective bargaining and contract enforcement does not violate the First Amendment. In this regard, *Hanson* and *Abood* represent a particular application to the collective bargaining context of the principle that a state does not violate the First Amendment by adopting reasonable economic regulations that have incidental effects on the freedom of covered

individuals to speak or to refrain from speaking. The petitioners' contention that *Hanson* is not a First Amendment precedent and was therefore incorrectly treated as such in *Abood* is baseless. Since the petitioners do not allege that they have been compelled to financially support union expressive activities outside the realm of collective bargaining, their First Amendment challenge to the fair share agreement fails.

ARGUMENT

In the courts below, petitioners claimed that the First Amendment forbids the State of Illinois from ncluding in its collective bargaining agreement covering personal assistants a provision requiring all covered individuals to pay their share of the costs incurred by their representative in negotiating and enforcing the agreement. In this Court for the first time, petitioners have added a claim that the First Amendment forbids the State from even negotiating a collective bargaining agreement covering the unit of personal assistants. The collective bargaining agreement here does nothing more than set those economic terms of the personal assistants' employment that are within the State's control. And the petitioners do not allege that the financial support for the collective bargaining representative required by the agreement extends beyond the cost of negotiating and enforcing the agreement. That being so, this Court's decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), dispose of petitioners' First Amendment claims.

I. THIS COURT'S DECISION IN *RAILWAY EMPLOYES' DEPT. v. HANSON*, AS CORRECTLY APPLIED IN *ABOOD v. DETROIT BOARD OF EDUCATION*, ESTABLISHES THAT REQUIRING PUBLIC EMPLOYEES TO FINANCIALLY CONTRIBUTE TO THE COSTS OF COLLECTIVE BARGAINING DOES NOT VIOLATE THE FIRST AMENDMENT.

Railway Employes' Dept. v. Hanson considered a First Amendment challenge to § 2, Eleventh of the Railway Labor Act, which authorized the inclusion of a union shop provision in collective bargaining agreements covered by that statute, despite applicable state law prohibiting such provisions. 351 U.S. at 232. The Court unanimously held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Id.* at 238. At the same time, the Court added that "[i]f other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." *Ibid.*

Machinists v. Street, 367 U.S. 740 (1961), "squarely . . . present[ed] the constitutional questions reserved in *Hanson*," *id.* at 749, because the lower court had found that the required financial support had been "used in substantial amounts to propagate political and economic doctrines, concepts and ideologies and to promote legislative programs opposed by plain-

tiffs," *id.* at 746 n. 2. The Court avoided deciding whether requiring financial support for such speech violates the First Amendment by concluding that the Railway Labor Act could be construed as "den[ying] the authority to a union, over the employee's objection, to spend his money for political causes which he opposes." *Id.* at 750.

The core issue addressed in *Abood v. Detroit Board of Education* was "whether an agency-shop provision in a collective-bargaining agreement covering government employees is, as such, constitutionally valid," and the Court concluded that *Hanson* and *Street* "on their face go far toward resolving th[at] issue." 431 U.S. at 217. Having first observed that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," the *Abood* Court went on to say that "the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222. The Court concluded that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions . . . appear to require validation of the agency-shop agreement before us." *Id.* at 225-26. The Court explained that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights" and thus *Hanson* was "controlling . . . insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232.

In sum, as this Court recently observed,

> "In *Hanson*, *Street*, and *Abood*, the Court set forth a general First Amendment principle: The First Amendment permits the government to require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee as a condition of their continued employment. Taken together, *Hanson* and *Street* make clear that the local union cannot charge the nonmember for certain activities, such as political or ideological activities (with which the nonmembers may disagree). But under that precedent, the local can charge nonmembers for activities more directly related to collective bargaining." *Locke v. Karass*, 555 U.S. 207, 213 (2009).

The petitioners have sought to distinguish *Abood* on the ground that aspects of their employment are under the control of the individuals to whom the assistants provide care, but there is nothing in *Abood* to suggest that variations in the employment relation make any difference to the constitutional analysis. Indeed, the fact that *Abood* treated *Hanson* – a decision involving the railroad industry – as controlling in the public sector establishes that the particular nature of the employment relation does not matter at all. *See also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 722 (1996).

The petitioners "have not alleged that the exclusive representation system here has imposed any burden on [them] beyond supporting the collective bargaining arrangement from which they benefit." Pet. App.

35a. *See also id.* at 7a (petitioners "do not allege that the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining"). Thus, under the square holdings of *Hanson* and *Abood*, their First Amendment challenge to the collective bargaining arrangement and to the fair share fee covering the costs of representation are without merit.

II. *ABOOD* CORRECTLY TREATED *HANSON* AS A CONTROLLING FIRST AMENDMENT PRECEDENT.

Recognizing that *Abood*'s application of *Hanson* to public sector collective bargaining is fatal to their First Amendment claims, petitioners boldly argue that "*Abood* should be overruled because it failed to give adequate recognition to First Amendment rights." Pet. Br. 18 (capitalized and boldfaced heading in original). There is no substance to petitioners' attempt to impugn *Abood*.

Far from being "offensive to the First Amendment," Pet. Br. 23, *Abood* is the fount of this Court's First Amendment jurisprudence concerning compulsory fees in a wide range of settings beyond that of collective bargaining. "A proper application of the rule in *Abood*," *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001), has "provide[d] the beginning point for [this Court's] analysis," *Board of Regents v. Southworth*, 529 U.S. 217, 230 (2000), in every subsequent case involving a First Amendment challenge to a compulsory fee. The Court has "repeatedly adhered to [*Abood*'s] reasoning in cases of compelled contributions," and, thus, "the centrality of the *Abood* line of authority for resolving [such cases]" has been beyond

dispute. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 482-83 (1997) (Souter, J., dissenting). *See also id.* at 478 ("I certainly agree with the Court that a proper understanding of *Abood* is necessary for the disposition of this case.").

Petitioners' explication of the asserted failures of *Abood*'s First Amendment analysis simply exposes their own misunderstanding of this Court's decisions. The sum and substance of that critique is as follows:

> "As the *Abood* majority saw it, a mandatory-fee agreement was 'constitutionally justified by the legislative assessment of the important contribution of the union . . . to the system of labor relations established by [the legislature].' *Id.* at 222. * * * For this proposition the Court relied on *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956)[.] * * * However, the First Amendment did not factor into that Commerce Clause decision. Thus, *Abood* turned what had been a Commerce Clause, rational-basis justification for a particular Railway Labor Act provision into a government interest so compelling that it could trump public employees' First Amendment right to free association." Pet. Br. 18-21.

Contrary to the petitioners' premise, *Hanson* is a First Amendment precedent and *Abood* correctly followed *Hanson* in holding that the First Amendment does not prohibit a state government from setting its terms of employment through collective bargaining and requiring the affected state employees to bear the costs of representation in that bargaining process.

In *Hanson*, this Court reviewed a decision of the Nebraska Supreme Court that "held that the union shop agreement violates the First Amendment in that

it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the cost of collective bargaining." 351 U.S. at 230. The principal question addressed by this Court was whether the Railway Labor Act's authorization of such agreements raised "problems . . . under the First Amendment" in that "the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." *Id.* at 236. Addressing this question, *Hanson* held that so long as "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining," *id.* at 235, "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar," *id.* at 238. Thus, "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendment[]." *Ibid.*[2]

Abood found *Hanson* to be "controlling . . . insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 U.S. at 232. And, as Justice O'Connor correctly observed, this application of *Han-*

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[2] Precisely because *Hanson* is a First Amendment precedent, it was understood to directly govern a "lawyer['s] claim that he could not constitutionally be compelled to join and financially support a state bar association." *Keller v. State Bar of California*, 496 U.S. 1, 7 (1990). *See id.* at 7-9, quoting *Lathrop v. Donohue*, 367 U.S. 820, 842-43 & 849 (1961).

son is merely a "rul[ing] that a State may compel association for the *commercial purposes* of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances." *Roberts v. United States Jaycees*, 468 U.S. 609, 638 (opinion of O'Connor, J., concurring) (emphasis added). In this regard, Justice Souter has aptly explained:

> "Collective bargaining, and related activities such as grievance arbitration and contract administration, are part and parcel of the very economic transactions between employees and employer that [the government] can regulate, and which it could not regulate without these potential impingements on the employees' First Amendment interests. *Abood* is thus a specific instance of the general principle that government retains its full power to regulate commercial transactions directly, despite elements of speech and association inherent in such transactions. See *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) (commercial conduct may be regulated without offending First Amendment despite use of language); *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (opinion of O'Connor, J., concurring in part and concurring in judgment) (in contrast to the right of expressive association 'there is only minimal constitutional protection of the freedom of *commercial* association,' because 'the State is free to impose any rational regulation on the commercial transaction itself'); see also *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (constitutional right of expressive association is not implicated by every instance in which individuals choose their associates); *Dallas v.*

Stanglin, 490 U.S. 19, 25 (1989) (same); *Ellis v. Railway Clerks*, 466 U.S. [435,] 456 [(1984)] (funding of union social activities, as opposed to expressive activities, has minimal connection with First Amendment rights)." *Glickman*, 521 U.S. at 484-85 (dissenting opinion).[3]

In criticizing *Abood*'s reliance on *Hanson*, petitioners rely principally on Justice Powell's concurring opinion. Pet. Br. 21-23. But *Abood*'s core ruling regarding collective bargaining was so uncontroversial that a short while later the Court in *Knight v. Minnesota Community College Faculty Assn.*, 460 U.S. 1048 (1983), summarily affirmed a three-judge district court decision that had "rejected [an] attack on the constitutionality of exclusive representation in bargaining over terms and conditions of

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[3] In *Glickman*, the Court considered whether the First Amendment allows the federal government to "impose assessments on [the growers and distributers of certain tree fruits] that cover the expenses of administering [marketing] orders, including the cost of generic advertising of California nectarines, plums, and peaches." 521 U.S. at 460. While the Court divided over the compelled support for advertising, both the majority and the dissenting opinions proceeded on the understanding that compelled support for the core regulatory activities raised no substantial First Amendment question, even though those activities contained "elements of speech and association" *id.* at 484, such as "joint research and development projects" and "committees composed of producers and handlers of the regulated commodity . . . who recommend rules to the Secretary [of Agriculture] governing marketing matters," *id.* at 461-62. *Accord United Foods*, 533 U.S. at 415 ("[T]he majority of the Court in *Glickman* found the compelled contributions were nothing more than additional economic regulation, which did not raise First Amendment concerns.").

employment, relying chiefly on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 278 (1984). Justice Powell joined the summary affirmance of the lower court decision in *Knight*, which is not surprising since he agreed with *Abood*'s holding that spreading the costs of negotiating economic terms and handling employment-related grievances among all benefitted employees does not raise any substantial First Amendment issue. *Abood*, 431 U.S. at 263 n. 16. Justice Powell's objection to the *Abood* majority opinion was its "apparent[] rul[ing] that public employees can be compelled by the State to pay full union dues to a union with which they disagree, subject only to a possible rebate . . . [of] some portion of their dues . . . spent on 'ideological activities unrelated to collective bargaining.'" *Id.* at 245. *See also id.* at 250 & 253.

Knight relies on *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979), as establishing that the First Amendment leaves "the State . . . free to consult or not to consult whomever it pleases" on employment matters. 465 U.S. at 285. In *Smith*, the Court rejected a claim that the Highway Commission's requirement that its employees submit their employment grievances on an individual basis "denied the union representing the employees the ability to submit effective grievances on their behalf and therefore violated the First Amendment." 441 U.S. at 463. The Court did so based on its conclusion that "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or . . . to recognize the [union] and bargain with it." *Id.* at 465.

While in *Smith* "the government listened only to individual employees and not to the union," the Court in *Knight* held the "applicable constitutional principles" are the same where "the government [negotiates] with the union and not with individual employees." 465 U.S. at 286-87.

Knight explained that "it is rational for the State to give the exclusive representative a unique role in the 'meet and negotiate' process" intended to result in a collective bargaining agreement for the simple reason that "[t]he goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.' See *Abood v. Detroit Board of Education*, 431 U.S. at 224." *Knight*, 465 U.S. at 291. "To attain the desired benefit of collective bargaining, union members and nonmembers [a]re required to associate with one another, and the legitimate purposes of the group [a]re furthered by the mandated association." *United Foods*, 533 U.S. at 414. *See Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 50 (1983) (granting union access to school mail system allows it "to perform effectively its obligations as exclusive representative" and thus "may reasonably be considered a means of insuring labor peace within the schools"). There can be little doubt that requiring the represented employees to financially support the costs of representation is rationally related to the system of collective bargaining. *See* Richard A. Posner, *Economic Analysis of Law* 430 (8th ed. 2011) ("The representation election, the principle of exclusive representation, and the union shop together constitute an ingenious set of devices . . . for overcoming the free-rider problems that

would otherwise plague the union as a large-numbers cartel.").[4]

The only thing at issue in this case is the decision by the State of Illinois to engage in collective bargaining with the chosen representative of the personal assistants over the compensation paid by the State for their services and to include in the resulting agreement a provision requiring the personal assistants to contribute to the costs incurred by their representative in negotiating and enforcing the agreement. The State's decisions in these regards are rationally related to its system for establishing the economic terms of employment for personal assistants and thus do not result in any infringement of the personal assistants' First Amendment rights.

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[4] The economic literature recognizes that "union bargaining services . . . have economic properties identical to those which define that class of goods and services traditionally labeled 'collective' or 'public' in economic literature" and that "the existence of collective goods requires that coercive arrangements be created if the society is to provide these goods equitably and efficiently." Allan G. Pulsipher, *The Union Shop: A Legitimate Form of Coercion in a Free-Market Economy*, 19 Ind. & Lab. Rel. Rev. 529, 529 & 531 (1965-66). Thus, "widely accepted principles of economic theory can be used to substantiate union demands for the power to force those who benefit from their bargaining activities to pay for them." *See id.* at 530-31 (surveying the literature on the "theory of collective or public goods").

III. THE *ABOOD* LINE OF CASES ESTABLISHES A BALANCING TEST FOR DETERMINING WHETHER THE USE OF FAIR SHARE FEES FOR EXPRESSIVE ACTIVITIES UNRELATED TO COLLECTIVE BARGAINING IS CONSTITUTIONAL.

Of course, *Abood* did more than simply apply *Hanson* to public sector collective bargaining. Where the *Abood* decision broke new ground was in addressing the extent to which public employees could be compelled to financially support expressive activities outside the realm of collective bargaining.

Abood "present[ed] constitutional issues not decided in *Hanson* or *Street*," because the state law at issue had been construed to allow "the use of nonunion members' fees for purposes other than collective bargaining." *Abood* 431 U.S. at 232. The *Abood* Court concluded that "[t]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Id.* at 234. And, the Court held that the same "principles [that] prohibit a State from compelling any individual to affirm his belief in God or to associate with a political party" also "prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235.

In remanding the case for further proceedings, the *Abood* majority remarked that "[t]here will, of course, be difficult problems in drawing lines between collective-bargaining, for which contributions may be compelled, and ideological activities unrelated to col-

lective bargaining, for which such compulsion is prohibited," and that the "line . . . may be hazier" in the public sector where "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities" and where "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." 431 U.S. at 236. The *Abood* majority also instructed the lower court that "[i]n determining what remedy will be appropriate if the appellants prove their allegations, the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237. Justice Powell objected to this aspect of the majority opinion, because he felt that this ruling was "not only unnecessary on th[e] record" but "unsupported by either precedent or reason." *Id.* at 245 (Powell, J., concurring in the judgment).

The *Abood* majority opinion expressly left "some leeway for the leadership of the group" in "act[ing] to promote the cause which justified bringing the group together." 431 U.S. at 223 (quotation marks and citation omitted). "In *Ellis* [*v. Railway Clerks*, 466 U.S. 435 (1984),] and *Lehnert* [*v. Ferris Faculty Assn.*, 500 U.S. 507, 516 (1991)], the Court . . . refined the boundaries of *Abood*'s constitutional 'leeway' by describing the nature of the cost elements that the [union], constitutionally speaking, could include, or which the [union] could not constitutionally include, in the serv-

ice fee." *Locke*, 555 U.S. at 214.[5] In so doing, the Court has articulated the following test for determining which nonbargaining uses – i.e., uses beyond the representational activities – are chargeable:

> "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519.

The *Ellis/Lehnert* elaboration of *Abood* defines a legal analysis that is similar to that followed in determining the constitutionality of a public employer's restrictions on its employees' speech as citizens on matters of public concern. *See Borough of Duryea v. Guarnieri*, 564 U.S. ___, 131 S.Ct. 2488, 2493 (2011) ("Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged. Courts balance the First Amendment interest of the employee against 'the in-

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[5] The Court subsequently elaborated the procedural aspects of *Abood* by specifying "the constitutional requirements" for agency fee objection procedures in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986). *Knox v. Service Employees Local 1000*, 132 S.Ct. 2277, 2291 (2012), further elaborated the procedural requirements by ruling that a union may not charge nonmembers "a special assessment billed for use in electoral campaigns." Contrary to what the petitioners apparently believe, the *Knox* opinion did not invite a wholesale attack on *Abood*'s central holding regarding financial support for collective bargaining; indeed, the *Knox* opinion expressly stated that it was "not revisit[ing]" prior cases in the *Abood* line of precedents. *Id.* at 2289.

terest of the State, as an employer, in promoting the efficiency of the public services it performs through it employees.'"); *Connick v. Myers*, 461 U.S. 138, 150 (1983) ("[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."). The state's authority to act is at its greatest with respect to the regulation of employment-related matters such as collective bargaining over terms of employment and controlling an employee's performance on the job. When the state goes beyond regulating employment-related matters, it is necessary to weigh the state's interests against the adverse effects of its actions on the affected employees' First Amendment rights. But here the State has required nothing more than financial support for the costs of representation within a system of collective bargaining over economic terms of employment.

IV. THE COLLECTIVE BARGAINING AT ISSUE HERE IS NOT SIMILAR TO LOBBYING IN ANY CONSTITUTIONALLY RELEVANT SENSE.

Petitioners attempt to invoke *Lehnert* by asserting that the collective bargaining provided for by the Illinois statute is "functionally indistinguishable" from "lobby[ing]." Pet. Br. 38. However, *Lehnert*'s description of what characterizes "lobbying" in the sense relevant here makes it clear that the negotiations supported by the personal assistants' fees do not constitute "lobbying."

Lehnert identified three aspects of "lobbying" that were relevant to the "hold[ing] that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities

outside the limited context of contract ratification or implementation." 500 U.S. at 522. In each respect, the negotiations at issue here are fundamentally different from "lobbying."

First, *Lehnert* noted that "it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities." 500 U.S. at 521. This is so, "because, unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all," and thus "[i]ndividual employees are free to petition their neighbors and government in opposition to the union which represents them" so that "worker and union cannot be said to speak with one voice." *Ibid.*

Negotiating sessions held pursuant to the IPLRA constitute "collective bargaining negotiations between union and management" and are certainly not "public fora open to all." *Lehnert*, 500 U.S. at 521.[6] IPLRA follows typical public sector bargaining laws in providing that in such "closed bargaining sessions" the govern-

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[6] Correspondingly, the union is not free to bargain with any public official it chooses but must bargain with the State's designated representative. As in other bargaining under the IPLRA, the Illinois Department of Central Management Services and a designee of the relevant program department, here the Department of Human Services, act as the State's representatives in collective bargaining over the terms of the personal assistants' employment. *See* http://www2.illinois.gov/cms/Employees/Personnel/Pages/PersonnelLaborRelations.asptx. When the union engages in lobbying it is free to address any public official who is willing to listen.

ment will "admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees." *City of Madison Jt. School Dist, No. 8. v. Wisconsin Emp. Rel. Commn.*, 429 U.S. 167, 178 (Brennan, J., concurring). Such sessions are exempt from the Illinois Open Meetings Law. 5 ILCS 120/2(c)(2). And, what occurs at such sessions is exempt from public disclosure under § 7 of the Illinois Freedom of Information Act. 5 ILCS 140/7(1)(p). Illinois law thus shields collective bargaining from public disclosure in the same manner that it shields other types of commercial contract negotiations. *See, e.g.*, 5 ILCS 120/2(c)(5)("purchase or lease of real property") & (c)(7) ("sale or purchase of securities, investments, or investment contracts"); 5 ILCS 140/7(1)(h)("Proposals and bids for any contract, grant, or agreement") & (r)("records, documents, and information relating to real estate purchase negotiations"). *See City of Madison Jt. School Dist.*, 429 U.S. at 175 n. 6 (drawing a distinction of constitutional significance between the school board's "open session where the public was invited" and "true bargaining sessions between the union and the board . . . conducted in private").

Second, *Lehnert* noted that "the so-called 'free-rider' concern is inapplicable where lobbying extends beyond the effectuation of a collective-bargaining agreement," because the "policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life." 500 U.S. at 521.

Collective bargaining on behalf of personal assistants, however, is expressly limited to establishing the

terms of employment controlled by the State through negotiations with designated executive branch representatives. 5 ILCS 315/7. Thus, the negotiations primarily concern the personal assistants' compensation and have, in fact, resulted in annual increases in their wages and an expanded range of fringe benefits. The State has a rational basis for "distribut[ing] fairly the cost of [bargaining] among those who benefit." *Abood*, 431 U.S. at 221. *See Hall v. Cole*, 412 U.S. 1, 9 (1973) (citation and quotation marks omitted) (endorsing a rule that "shifts the costs of litigation to the class that has benefited from them").

Finally, and "most important," *Lehnert* observed that "allowing the use of dissenters' assessments for political activities outside the scope of the collective-bargaining context would present additional interference with the First Amendment interests of objecting employees." 500 U.S. at 521 (internal quotation marks omitted). "There is no question as to the expressive and ideological content of these activities," and "unlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views." *Ibid.*

Once again, the limited scope of negotiations under the IPLRA demonstrates how fundamentally different that activity is from lobbying. Such negotiations involve no effort "to communicate to the public or to advance a political or social point of view beyond the employment context." *Guarnieri*, 131 S.Ct. at 2501. And, the matters discussed – principally the economic terms of the personal assistants' employment – are entirely nonideological and virtually certain to be uncontroversial among

the fee payers. Significantly in this regard, while the petitioners have sought to strike down the contract provision requiring that they contribute a very modest amount to the cost of collective bargaining, they have been content to leave standing the provisions guaranteeing them substantial annual wage increases and valuable health insurance benefits.

V. POLICY CHOICES REGARDING PUBLIC SECTOR COLLECTIVE BARGAINING SHOULD BE MADE THROUGH THE LEGISLATIVE AND POLITICAL PROCESSES.

The arguments advanced by petitioners make it "appropriate to emphasize the difference between policy judgments and constitutional adjudication." *Glickman*, 521 U.S. at 475. "Much might be said pro and con if the policy issue [of fair share fees] were before [the Court]." *Hanson*, 351 U.S. at at 233. Indeed, much has recently been said pro and con in legislative and political debates over public sector collective bargaining generally and fair share fee agreements specifically. *See* Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 Hofstra Lab. & Emp. L.J. 511, 512 (2013) (noting "major swings in the pendulum concerning public employee collective bargaining rights"); Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 ABA J. Lab. & Emp. Law 149, 150 (2012) (noting "significant rewriting of statutes, and the creation and elimination of statutes").

In 2012, for example, two states adopted laws prohibiting fair share fee agreements in the public sector. *See* Mich. Pub. Acts No. 349 (2012); Ind. Code § 22-6-6-8 (2012). Other states have recently enacted legis-

lation affecting specific groups of public employees' rights to bargain collectively. In Wisconsin, for example, the legislature decided to drastically limit collective bargaining and bar the negotiation of fair share agreements for most state employees but saw fit to preserve bargaining for public safety and transit employees and, over a more limited range, for municipal employees. 2011 Wis. Act 10 §§ 265 & 279-80 (amending Wis. Stat. § 111.70(1)(a)). In 2011, recognizing the sensitive balancing of interests that adjusting collective bargaining rules requires, the Indiana legislature determined that it would be prudent to limit the scope of public school teachers' permissible subjects of bargaining but to otherwise maintain collective bargaining. Ind. Code § 20-29-6. *See also* Tenn. Code Ann. § 49-5-601 (replacing formal collective bargaining rights for public school teachers with "collaborative conferencing" rights). Other states, like Oklahoma, declined to resolve the complex political questions involved in altering collective bargaining schemes on a state-wide basis, instead vesting municipal authorities with discretion to decide whether or not to engage in collective bargaining with their employees. H.B. 1593 (Okla. 2011).

State efforts to restrict or limit collective bargaining and to alter fair share fee arrangements are often accompanied by considerable public debate. For instance, in Ohio, the state legislature passed a bill that would have sharply limited public employees' collective bargaining rights, *see* S.B. 5 (Ohio 2011), but it was repealed by Ohio voters by referendum. Given the fraught nature of these political decisions, it is unsurprising that many states that considered enacting legislation to limit or eliminate

public sector collective bargaining[7] or to abolish fair share fee arrangements[8] ultimately declined to do so.

"The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." *Hanson*, 351 U.S. at 234. The political process is the appropriate means for resolving this policy dispute. And petitioners should not be allowed to substitute adjudication for engagement in the democratic process.

See, e.g., H.B. 200 (Alaska 2011); S.B. 38 (Colo. 2011); H.B. 416 (Ga. 2011); S.B. 278 (Haw. 2011); S.B. 1242 (Idaho 2012); S.B. 1556 (Ill. 2011); S.B. 2187 (Iowa 2012); Leg. Res. 29 (Neb. 2012) (proposing a constitutional amendment to prohibit the state from engaging in collective bargaining); H.B. 1645 (N.H. 2012); H.B. 4194 (S.C. 2012); H.B. 1261 (S.D. 2012); S.B. 5349 (Wash. 2012); H.B. 58 (Wyo. 2012).

[8] *See, e.g.*, S.B. 41 (Ala. 2013) (proposing a state constitutional amendment); H.B. 5168 & 5169 (Conn. 2013); H. J. Res. 1 (Iowa 2013) (proposing a state constitutional amendment); H.B. 144 (Ga. 2013) (proposing a state constitutional amendment); H.B. 3160 (Ill. 2013); H.B. 308 (Ky. 2013); H.B. 537 & 582 (Me. 2013); H.B. 318 (Md. 2013); H.B. 323 (N.M. 2013); H.B. 192 (Minn. 2012); H.B. 95 (Mo. 2013); Draft B. 229 (Mont. 2012); H.B. 323 (N.H. 2013); Assemb. B. 136 (N.J. 2013); H.B. 53 (N.C. 2013) (proposing a state constitutional amendment); H. J. Res. 5 (Ohio 2013) (proposing a state constitutional amendment); H.B. 151 & 152 (Ohio 2013); H.B. 3062 (Or. 2013); H.B. 50 (Pa. 2013); H. J. Res. 7 (Va. 2013) (proposing a state constitutional amendment); H.B. 2010 (W. Va. 2013); H. J. Res. 30 (W. Va. 2012) (proposing a state constitutional amendment); S.B. 409 & 2258 (R.I. 2012); H.B. 134 (Alaska 2011); S.B. 1998 (Mass. 2011).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-681

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In The Supreme Court Of The United States

PAMELA HARRIS ET AL.,

PETITIONER,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF CALIFORNIA, CONNECTICUT, MARYLAND, MASSACHUSETTS, OREGON, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The amici States have each enacted homecare systems that, like the Illinois system, include collective bargaining, and we have seen enormous benefits from such systems. States pay homecare workers to care for some of our most vulnerable elderly and disabled citizens, which not only allows these citizens to remain in their homes, but also saves states vast sums as compared to institutionalization. The individual clients who receive services, however, have no ability to look out for such broader goals as ensuring an adequate and well-trained homecare workforce. The amici States have stepped in to fill this role, and collective bargaining is a key component of our efforts. In partnership with homecare workers, the amici States have negotiated training requirements, referral programs, and optimized wage and benefit packages that have allowed us to recruit and better retain a talented pool of homecare workers.

As sovereign states and proprietors of our own homecare programs vital to our residents, states should be allowed the flexibility to structure our programs. Collective bargaining is a key part of these programs and, as this Court has long recognized, exclusive representation and fair-share fees are important parts of a fair and effective collective bargaining system. The amici States want the Court to affirm longstanding precedent recognizing their authority so that we can continue developing an adequate and well-trained supply of homecare workers and ensure that our citizens can receive quality homecare now and into the future.

SUMMARY OF ARGUMENT

Homecare keeps many of our elderly and disabled citizens in their homes and out of institutions. The need for an adequate and well-trained supply of homecare workers is great, but individual clients have no ability to ensure that supply, and historically there has been a shortage of skilled homecare workers in many states, sometimes leading to costly and unnecessary institutionalization.

The amici States have passed laws that allow for collective bargaining to improve the working conditions and training of homecare workers. These laws help ensure that enough workers enter and remain in the profession to meet the needs of an aging population. The amici States passed these laws in justifiable reliance on *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977), which recognized that effective collective bargaining is grounded in exclusive representation and fair-share fees or union shop agreements.

Although this Court has never questioned the core holdings of *Abood*, petitioners ask the Court to overrule it. But states have for decades acted in justifiable reliance on *Abood*, and petitioners provide none of the special justifications required to abandon longstanding precedent. In addition, the Court traditionally gives great deference to states acting in their proprietary capacities. States act as proprietors when they decide how to most effectively and efficiently deliver state-funded services to state citizens. Each amici State made a proprietary policy decision to authorize collective bargaining to address

homecare workforce issues because a quality and stable homecare workforce is essential to delivery of homecare services.

If the Court were to accept petitioners' unsupported claims and reject longstanding precedent, it would not only undermine the important benefits arising from collective bargaining and potentially lead to increased institutionalization of elderly and disabled citizens, but it would also undermine the amici States' prerogatives to run their own programs. The amici States therefore join Illinois in asking the Court to reject petitioners' arguments and affirm the Seventh Circuit's decision.

ARGUMENT

A. States Have A Vital Interest In Ensuring An Adequate And Well-Trained Homecare Workforce, Which Has Historically Been Extremely Difficult

Most Americans who need long-term care would rather stay at home than be placed into long-term care institutions.[1] Homecare workers allow patients to stay at home by assisting with activities of daily living such as bathing, dressing, and managing medications.[2] Through Medicaid, states fund homecare workers for low-income patients.

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[1] Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 Iowa L. Rev. 1835, 1837 (July 2007).

[2] Robyn I. Stone, *The Direct Care Worker: The Third Rail of Home Care Policy*, 25 Ann. Rev. Pub. Health 521, 522 (2004), *available at* http://www.leadingage.org/uploadedFiles/Content/About/Center_for_Applied_Research/Publications_and_Products/Direct_Care_Worker_Home_Care_Policy.pdf.

Homecare is difficult and physically demanding work.[3] Historically, homecare workers have also faced low wages, few benefits, frequent injuries, and unpredictable hours,[4] with no means to collectively address such challenges in their interactions with their individual clients.

In part, for these reasons, homecare workers have typically turned over at a very high rate,[5] which harms state budgets and makes it difficult to develop a well-trained workforce.[6] Each time a worker leaves, the cost to states can be as high as $5,200.[7] With hundreds of thousands of people working in homecare[8] and an annual turnover rate of roughly fifty percent in many states, the cumulative replacement costs for states are enormous. This high

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[3] Smith, 92 Iowa L. Rev. at 1871.

[4] *Id.* at 1871-72; Peggie R. Smith, *Who Will Care for the Elderly?: The Future of Home Care*, 61 Buff. L. Rev. 323, 329 (April 2013); Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1397 (May 2008); Dorie Seavey & Abby Marquand, *Caring in America: A Comprehensive Analysis of the Nation's Fastest-Growing Jobs: Home Health and Personal Care Aides* 60 (Dec. 2011), *available at* http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.

[5] Smith, 61 Buff. L. Rev. at 336 (explaining that at least forty-four percent and possibly as high as ninety-five percent of homecare workers annually leave the homecare workforce).

[6] Dorie Seavey, *The Cost of Frontline Turnover in Long-Term Care* 6, 20 (Oct. 2004), *available at* http://phinational.org/sites/phinational.org/files/clearinghouse/TOCostReport.pdf.

[7] *Id.* at 11; Smith, 61 Buff. L. Rev. at 334-35.

[8] Smith, 92 Minn. L. Rev. at 1393 n.17.

turnover also may drive more long-term care clients from their homes to institutions, thereby limiting clients' freedom and escalating the costs to states and taxpayers.[9]

These problems will compound as the nation's baby boomers age. As of 2010, about forty million Americans, or thirteen percent of the population, were sixty-five or older.[10] By 2030, that number will likely increase to seventy-two million, or twenty percent of the population.[11] As a result, two categories of homecare jobs are expected to rank as the second and third fastest-growing occupations in the nation.[12]

Although the need for homecare workers is great, many states face a crisis in attracting and retaining homecare workers.[13] In a recent survey, ninety-seven percent of responding states reported that the homecare worker shortage is a serious problem.[14] For that reason, many states are taking

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[9] Smith, 92 Iowa L. Rev. at 1848; Charlene Harrington, Terence Ng & Martin J. Kitchener, *Do Medicaid home and community based service waivers save money?*, 30 Home Health Care Servs. Q. 198, 208-09 (2011) (homecare rather than institutionalization saves states approximately $57 billion annually).

[10] Smith, 61 Buff. L. Rev. at 325.

[11] *Id.*

[12] Paraprofessional Healthcare Institute (PHI), *The 2007 National Survey of State Initiatives on the Direct-Care Workforce: Key Findings* 2 (Dec. 2009), *available at* http://phinational.org/sites/phinational.org/files/clearinghouse/PHI-StateSweepReport%20final%2012%209%2009.pdf.

[13] Smith, 61 Buff. L. Rev. at 336.

[14] PHI, *The 2007 National Survey* at 2.

steps to improve homecare working conditions, thereby enticing workers into homecare and trying to keep them there.[15]

B. Collective Bargaining Has Proven To Be An Effective Tool To Improve Homecare Working Conditions, Which In Turn Improves The Stability And Quality Of The Homecare Workforce

Like Illinois, all of the amici States use the same tool of collective bargaining to improve homecare workers' working conditions. As a result, homecare working conditions in the amici States rank among the best in the nation. This is a perfect example of states effectively serving as "laboratories of democracy," and the Court should respect our policy choices and success.

In Washington, for example, collective bargaining for homecare workers resulted from a 2001 ballot initiative that the people overwhelmingly voted to enact. Initiative 775 (codified in pertinent part at Wash. Rev. Code § 74.39A.270); Wash. Sec'y of State, [*2001*] *Official Returns of the State General Election* (Nov. 6, 2001)[16] (nearly sixty-three percent approval of Initiative 775). In the official voter's pamphlet, the initiative proponents decried that "high turnover and wages barely above minimum wage have led to a shortage of caregivers," and noted that the initiative "helps workers make a profession

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[15] PHI, *The 2007 National Survey* at 7-20.

[16] *Available at* https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/Pre2004/Documents/2001/2001%20General%20Abstract.pdf.

of providing quality homecare by receiving better training and negotiating for a living wage and benefits." Wash. Voter's Pamphlet 8 (2001).[17]

After the initiative passed, eighty-four percent of Washington's homecare workers voted to be unionized. Rebecca Cook, *Home Care Workers Say Yes to Union in Record Vote*, Seattle Post-Intelligencer, Aug. 16, 2002.[18] Collective bargaining in Washington has led to a wide range of improvements. For example, Washington homecare workers receive annual training and a peer mentoring program has been established to help new homecare workers excel at the work. 2013-2015 Collective Bargaining Agreement, art. 9.2[19]; Wash. Rev. Code § 74.39A.331. Homecare workers can climb a "career ladder" that creates eight wage rates based on a worker's experience and training, thereby rewarding workers for their longevity and expertise. 2013-2015 Collective Bargaining Agreement, App. A. Homecare workers also can be placed on a registry for referral to clients. 2013-2015 Collective Bargaining Agreement, art. 15.1, 15.3.

Collective bargaining in Washington also has led to increased wages; paid time off for workers; and health, dental, and vision insurance benefits. 2013-

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[17] *Available at* https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/documents/voters%27pamphlets/2001_general_election_voters_pamphlet.pdf.

[18] *Available at* http://www.seattlepi.com/default/article/Home-care-workers-say-yes-to-union-in-record-vote-1093759.php.

[19] *Available at* http://www.ofm.wa.gov/labor/agreements/13-15/nse_hc.pdf.

2015 Collective Bargaining Agreement, App. at A-1, A-2; art. 12; art. 10. These improved working conditions further Washington's goal of attracting and retaining a qualified homecare workforce.

In Oregon, collective bargaining also passed by popular initiative. In 2000, the voters passed ballot measure 99 which amended Oregon's constitution with the Oregon Homecare Quality and Accountability Act.[20] Or. Const. art. XV, § 11, note. The law established the Home Care Commission, which is the employer of record of homecare workers for collective bargaining purposes. Or. Const. art. XV, § 11(1). Homecare workers have the right to form, join, and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with the commission on matters concerning employment relations. Or. Const. art. XV, § 11(3)(f). Homecare workers have public employees' collective bargaining rights, with mediation and interest arbitration as the method of concluding the collective bargaining process. Or. Const. art. XV, § 11(3)(f).

In Massachusetts, the 2006 legislature enacted a similar law overriding the governor's veto by unanimous votes in both houses. *See* 2006 Mass. Acts and Resolves, ch. 268.[21] The law, now codified at Mass. Gen. L. ch. 118E, §§ 70-75, established a state Personal Care Attendant Quality Home Care

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[20] The ballot measure is available at http://oregonvotes.org/pages/history/archive/nov72000/guide/mea/m99/m99.htm.

[21] *Available at* https://malegislature.gov/Laws/SessionLaws/Acts/2006/Chapter268.

Workforce Council, in order "to ensure the quality of long-term, in-home, personal care by recruiting, training and stabilizing the work force of personal care attendants." Mass. Gen. L. ch. 118E, § 71(a). Homecare workers in Massachusetts, called Personal Care Attendants (PCAs), were allowed to choose whether to unionize under the state's public-sector labor relations law and to collectively bargain, with the PCA Council representing the state. Mass. Gen. L. ch. 118E, § 73(b)-(e). In 2007, ninety-four percent of the homecare workers voting favored unionization,[22] and their union has since negotiated three collective bargaining agreements, the first in 2008 and the most recent covering 2012-2015.[23]

The current agreement's goals are to provide homecare workers' clients with the "highest possible quality of care," to treat consumers and homecare workers alike with the "highest degree of dignity and respect," and to promote "quality jobs" for homecare workers. 2012-2015 Collective Bargaining Agreement, Preamble.[24] The agreement includes provisions promoting continuity of care for clients (art. 6); broadly protecting homecare workers against job discrimination (art. 7); allocating $1 million in state money to a Training and Upgrading Fund to be used for training programs as determined by a Joint

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[22] *See* Associated Press, *Mass. Home Health Care Workers Vote to Unionize*, *available on* Westlaw at 11/8/07 APALERTMA 19:53:41.

[23] http://www.mass.gov/pca/union/labor-agreements.html.

[24] *Available at* http://www.mass.gov/pca/docs/pca-fully-executed-cba-2012.pdf.

Labor-Management Committee (art. 8); studying how best to provide health insurance for homecare workers beginning July 1, 2014 (art. 11); providing training on client and worker health and safety (art. 12); providing paid time off (art. 13); and providing for time-and-one-half pay for homecare workers who work on any of four specified holidays (art. 14).

California also authorizes collective bargaining with homecare workers. However, California differs from other states in that it has implemented homecare collective bargaining on a county-by-county level. In 1992, the state legislature authorized and provided a funding mechanism for counties to establish public authorities to coordinate the delivery of homecare services. 1992 Cal. Stat. ch. 722, § 54; 1993 Cal. Stat. ch. 69, § 55. Six years later, the legislature required all counties that had not yet done so to establish public authorities or adopt one of a number of specified alternate methods for managing the homecare workforce. 1999 Cal. Stat. ch. 90, § 4.

Beginning in 1993, and continuing to the present day, homecare workers in fifty-five of California's fifty-eight counties have voted for unionization, so that 365,000 homecare workers are currently represented by unions and bargain Memoranda Of Understanding (MOU) with county public authorities. Some contracts provide for additional training of homecare workers through measures including free trainings on first aid, cardiopulmonary resuscitation, and other relevant topics; stipends for training sessions arranged by the

public authority; and reimbursements for training materials. *E.g.*, Santa Clara 2012-14 MOU, art. 8[25]; San Mateo 2012-14 MOU, art. 11. Other agreements require public authorities to make safety equipment such as masks and examination gloves available to homecare workers, and to provide health, dental, and vision benefits and transportation subsidies for homecare workers. *E.g.*, Solano 2011-15 MOU, § 13(A); Santa Cruz 2011-2014 MOU, art. 11, art. 17; Santa Clara 2012-14 MOU, art. 7, § 7-1; San Mateo 2012-14 MOU, art. 13; Alameda 2009-13 MOU, §§ 14, 17. And some include provisions related to statutorily required referral registries, such as mandates that referral priority be given to more experienced homecare workers. *E.g.*, Los Angeles 2012-14 MOU, art. XIV; Del Norte 2013-2015 MOU, art. XIII; San Bernardino 2013-14 MOU, "Registry Seniority."

As these examples show, the amici States have used collective bargaining to train, build, and stabilize their homecare workforces by cooperatively addressing working conditions most important to

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[25] The Memoranda Of Understanding are located at the following links: Santa Clara: http://www.seiu521.org/files/2011/05/IHSS-Contract-Feb.-1-2012-Feb.-2-2014.pdf; San Mateo: http://www.seiu521.org/files/2011/05/SM-IHSS-contract-june-2014.pdf; Solano: http://ultcw.org/files/2013/12/Solano-County-MOU-2011-2015.pdf; Santa Cruz: http://www.hsd.co.santa-cruz.ca.us/Portals/0/ihss/Santa-Cruz-MOU.pdf; Alameda: http://ultcw.org/files/2013/12/Alameda-MOU-2009-2013.pdf; Los Angeles: http://ultcw.org/files/2013/12/Los-Angeles-County-2012-2014-.pdf; Del Norte: http://www.countyofdelnorte.us/agendas/bos/MG94706/AS94719/AS94720/AI95872/DO95885/1.PDF; San Bernardino: http://ultcw.org/files/2013/12/San-Bernardino-MOU-2013-2014-MOU.pdf

homecare workers within each state. Collective bargaining is a give-and-take process that allows states and workers to negotiate the optimal mix of wages and benefits; implement training programs; create a grievance procedure or other dispute resolution process; establish a registry to refer workers to clients; and turn homecare into a career choice instead of a job of last resort. Unlike the individual clients who receive homecare services, the amici States have the will and the ability—by establishing a continuing process of bargaining and cooperation with a professionally staffed workforce representative—to address the overarching issues of this particular workforce, together finding innovative solutions tailored to the unique needs of these geographically dispersed and historically hard-to-recruit and retain workers.

Moreover, the evidence shows that collective bargaining works. For example, homecare workers with collective bargaining rights are over twice as likely to have health insurance as workers without those rights.[26] Studies also show that worker turnover has dropped in large part due to gains from collective bargaining.[27]

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[26] John Schmitt et al., *Unions and Upward Mobility for Low-Wage Workers* 6 (Aug. 2007), *available at* http://www.cepr.net/documents/publications/unions-low-wage-2007-08.pdf.

[27] Nari Rhee & Carol Zabin, *The Social Benefits of Unionization in the Long-Term Care Sector*, *in Academics on Employee Free Choice* 83, 91 (John Logan ed., May 2009), *available at* http://laborcenter.berkeley.edu/laborlaw/efca09.pdf.

The amici States have given their homecare workers the option of collective bargaining—an option that has successfully addressed the causes of high worker turnover by improving a range of work conditions. A stabilized and quality homecare workforce is good for the aging and disabled clients who need these services and for state budgets. The collective bargaining tool should remain available to states that have made the policy decision to use it, and to states who may see our success and adopt this approach in the future.

C. *Abood* Should Not Be Overruled, And Supports The Amici States' Proprietary Interest In Authorizing Collective Bargaining With Homecare Workers Who Deliver State-Funded Services To State Clients

The use of collective bargaining to ensure an adequate and well-trained homecare workforce is well within each state's authority recognized in *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977). Petitioners urge the Court to overrule *Abood*, but none of the factors that justify overruling longstanding precedent are present here, and this Court unanimously reaffirmed the core principles of *Abood* in *Locke v. Karass*, 555 U.S. 207 (2009). Petitioners also argue that *Abood* does not apply to homecare workers, but their arguments all miss the mark.

For several decades, state legislatures have relied upon *Abood* to pass laws that structure state labor relations, and workers have relied on the collective bargaining contracts negotiated as a result

of these laws. For example, Washington State has numerous statutes governing its collective bargaining process and currently has collective bargaining agreements with wide segments of public workers and contractors.[28]

The Court especially respects *stare decisis* when state legislatures have passed laws in reliance on prior Court decisions. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (refusing to overrule *Buckley v. Valeo* after Congress and state legislatures passed campaign finance laws in reliance on it); *Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (O'Connor, J., plurality) (refusing to overrule opinions permitting challenges to racial gerrymandering that state legislators relied upon in their districting practices); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 785-86 (1992) (refusing to overrule limitations on state taxation of certain corporations when state legislatures relied upon prior decisions in enacting tax codes). Furthermore, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved[.]" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). States have justifiably relied on the longstanding rule of *Abood*, and workers have

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[28] Wash. Rev. Code 41.56; Wash. Rev. Code 41.80; Wash. Rev. Code 47.64. *See also* http://www.ofm.wa.gov/labor/agreements/13-15/default.asp (identifying twenty-seven collective bargaining agreements with different categories of workers, including healthcare workers who staff state hospitals, educational employees, state police troopers, and craftspeople who maintain the state ferry system).

justifiably relied on the contracts negotiated under their states' collective bargaining laws. Petitioners identify no basis to upset that justifiable reliance.[29]

Abood recognizes that effective collective bargaining relies upon exclusive representation. *See Abood*, 431 U.S. at 220-21. Exclusive representation promotes labor peace and avoids the confusion that would arise from multiple agreements covering the same categories of workers. *Id.* at 220-21. Labor peace benefits not only the negotiating parties but serves a substantial public interest as well. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 13 (1990).

Petitioners argue that states have no interest in labor peace when the workforce is spread across multiple worksites. Pet'rs' Br. at 24-28. But nothing could be farther from the truth. The amici States cannot realistically negotiate individually with tens of thousands of homecare workers scattered across tens of thousands of worksites. Negotiating a single binding contract that covers the entire category of workers avoids the confusion and conflict that would arise from multiple labor agreements, which is one of the evils that the exclusivity rule is designed to avoid. *Abood*, 431 U.S. at 224. And the states' need for authority to negotiate a single contract with an exclusive collective bargaining representative may be even more compelling in relation to a large,

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[29] The amici States also agree with the arguments in New York's amicus brief addressing in more detail why *Abood* should not be overruled.

dispersed, and historically transient workforce without expertise in such matters. With such a workforce, learning about workers' views, needs, and priorities—and developing workforce policies to cost-effectively address those views, needs, and priorities—would be virtually impossible without the aid and expertise of the workers' representative.

Fair-share provisions are integral to exclusive representation. Such provisions ensure that the costs of representation are borne equally by those who benefit. *Abood*, 431 U.S. at 221-22. The alternative is that some workers who enjoy the shared benefits of improved working conditions will nevertheless become "free riders" by refusing to contribute to the collective bargaining activities that bring about the benefits. *Id.* at 222-23. Fair-share provisions advance the amici States' interest in labor peace by eliminating discord between those workers willing to fund collective bargaining and those who are not willing (but who still reap the benefits). Even more important, they remove an incentive that might make even those fully supporting bargaining reluctant to pay what would be more than their fair share, leading to serious underfunding of the process, even where full funding would benefit the workforce (and the states' programs) overall.

Petitioners also suggest that *Abood* does not apply here because homecare workers in Illinois are not treated as state employees for all purposes. This is a distinction without a constitutional difference. When states address homecare workforce issues,

they act as proprietors of their own state-funded programs to deliver services to state citizens. This Court accords great weight to decisions made by the government as proprietor and as manager of its own internal affairs. *See, e.g.*, *Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 757-58 (2011). This is true whether government is involved with managing employees or contractors. *Id.* at 758-59.

Here, each amici State made a legislative policy judgment allowing its homecare workers to choose collective bargaining. States as proprietors of their own state-funded programs are entitled to make this judgment. The Court respected the Michigan legislature's establishment of the collective bargaining system challenged in *Abood*. And the Court respected Congress's establishment of a collective bargaining system under the Railway Labor Act. *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225 (1956). The Court should likewise respect Illinois' decision to allow its homecare workers to collectively bargain and to permit the use of fair-share fees, a practice that is consistent with decades of precedent.

Moreover, contrary to petitioners' argument, upholding the Seventh Circuit's decision will not prevent homecare workers from individually petitioning their governments. Pet'rs' Br. at 39-46. Indeed, belonging to a union, including a public sector union, does not in any way deprive an individual of his right to express his views to government on any issues at all, including labor relations. *Abood*, 431 U.S. at 230. Rather than causing the harm prophesied by petitioners, upholding the Seventh Circuit decision will improve

homecare workers' lot by allowing the amici States, Illinois, and potentially other states in the future to continue using collective bargaining to stabilize and improve the quality of the homecare workforce.

CONCLUSION

The Court should affirm the Seventh Circuit and conclude that Illinois' fair-share provisions are consistent with the First Amendment.

RESPECTFULLY SUBMITTED.

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In the Supreme Court of the United States

PAMELA HARRIS, ET AL.,
Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF CALIFORNIA PUBLIC-SCHOOL TEACHERS, THE CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL, AND THE CENTER FOR INDIVIDUAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The First Amendment establishes that the government may neither "deny a benefit to a person on a basis that infringes his constitutionally protected ... interest in freedom of speech," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), nor "compel[] subsidies for speech in the context of a program where the principal object is speech itself," *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001). Here, the State of Illinois has required Petitioners—as a condition of public employment—to pay mandatory fees to a labor union, solely in order to fund that union's political speech in the form of negotiations with State officials. The court of appeals found that this arrangement was permitted by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Amici* will address the following question:

Should the Court overrule *Abood* and hold that public employment cannot be conditioned on the payment of fees to a labor union?

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INTEREST OF *AMICI CURIAE* [1]

Amici Karen Cuen, Harlan Elrich, Rebecca Friedrichs, Kevin Roughton, George White, Scott Wilford, and Irene Zavala are public-school teachers in California who, along with *amicus* Christian Educators Association International, are plaintiffs in a lawsuit currently pending in the District Court for the Central District of California, *Friedrichs v. California Teachers Association* (No. 8:13-cv-00676), that challenges a California law allowing school districts to enter into "agency shop" arrangements. Because this case implicates the scope and vitality of the decision allowing such arrangements, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the plaintiffs in *Friedrichs* have a pronounced interest in the outcome here.

The Center for Individual Rights is a public-interest law firm based in Washington, D.C. It has litigated many First Amendment lawsuits on behalf of parties and *amici*—including several cases in this Court—and is co-counsel to the plaintiffs in the *Friedrichs* suit. The Center has an interest in protecting public employees' right not to support expressive activity to which they are opposed.

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[1] The parties have filed with the Clerk letters consenting to the filing of *amicus* briefs. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to, at long last, give "adequate recognition to the critical First Amendment rights at stake" when the government forces public employees to financially subsidize the political speech of public-sector unions through "agency shop" agreements. *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012). Any focused analysis of such arrangements dooms this Court's decision in *Abood*, and the court of appeals' decision in this case along with it. Both should be overturned.

1. Under any normal application of First Amendment principles, compelled subsidization of public-sector union speech would be subject to heightened scrutiny. The opinion in *Abood* was able to avoid this result only by creating a completely unworkable distinction. The Court recognized that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment," such that a public employee cannot be required "to contribute to the support of an ideological cause he may oppose as a condition of holding a job." 431 U.S. at 234-35. Yet in the very same breath, *Abood* allowed public employers to require that all employees financially support a union's "attempt to influence governmental policymaking" in collective bargaining, even though public-sector collective bargaining "may be properly termed political." *Id.* at 231. This distinction between "bargaining" political speech (exempt from the First Amendment) and all other political speech (protected by the First Amendment) is contrived and unworkable, and

Abood's authorization of compelled subsidization of political "bargaining" speech conflicts with at least three different lines of this Court's decisions.

First, this Court has long held that government employers "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Here, the State of Illinois (the "State") does precisely that. As a condition of public employment, every homecare provider in Illinois is required to toe the union line and support its message—rather than deliver his own message—to the State legislature. Whether spoken via bargaining, lobbying, or pamphleteering, a union's message embodies core political speech, as *Abood* itself recognized. 431 U.S. at 231. *Abood's* recognition that collective bargaining is political speech renders it irreconcilable with this Court's unconstitutional-conditions cases, especially *Elrod v. Burns*, 427 U.S. 347 (1976), and its progeny. As Justice Powell long ago recognized, "[t]he public-sector union is indistinguishable from the traditional political party in this country." *Abood*, 431 U.S. at 257 (Powell, J., concurring in judgment). Indeed, the State's regime imposes a *greater* burden than *Elrod's* coercion to join a political party, because here the State requires Petitioners to affirmatively subsidize the message of Respondent SEIU.

Second, the State's regime flies in the face of this Court's compelled-speech cases, foremost *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). That decision—which arose in the less exacting context of commercial speech—makes clear that a government may compel speech only as an incident to

a larger regulatory scheme. Such compulsion violates the First Amendment when speech "itself ... is the principal object" of the scheme. *Id.* at 411-12. *United Foods* forecloses precisely what *Abood* sanctions. Collective bargaining *is* speech, and the *entire point* of agency-shop laws is to require that non-union employees pay their "fair share," Pet.App. 6a, of "the costs" that speech incurs. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007). The only difference between this case and *United Foods* is that this case involves "political" speech, *Abood*, 431 U.S. at 231, and is thus *even more* offensive to the First Amendment.

Finally, and most simply, the State's system of compelled speech constitutes textbook viewpoint discrimination, *i.e.*, "censorship in its purest form.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). This Court has long held that when a government "attempt[s] to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978). Yet that is precisely what *Abood* permits—authorizing governments to give an "advantage" to the pro-union side of numerous "debatable public question[s]," *id.*, by forcing dissenting employees to support the union message.

2. Once it is clear that heightened First Amendment scrutiny applies, the underpinnings of *Abood* collapse. *Abood* and its progeny suggest two possible justifications for abridging the First Amendment rights of dissenting employees:

preventing "free-riding" and promoting "labor peace." Neither justification can survive inspection.

Foremost, "free-rider arguments [] are generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289. A union's efforts to obtain benefits for nonmembers from elected officials does not justify compelled subsidization of those "*bargaining*" efforts, just as the union's beneficial "*lobbying*" efforts do not either. But even if they did, this justification would *still* fail because it is untrue that dissenting employees "free-ride" off the union's advocacy. As *Abood* itself recognized, "[u]nion members in both the public and private sectors may find that a variety of union activities *conflict* with their beliefs." 431 U.S. at 231. Unions routinely bargain for provisions that dissenting employees oppose and do not benefit from—such as seniority protections that advantage veteran employees over newer employees, regardless of each individual's relative ability. Dissenting employees are not "free-riding"; they are being conscripted.

The only other justification *Abood* suggests is a state interest in preserving "labor peace." By this, *Abood* meant a state's interest in negotiating with a single union and avoiding a multiplicity of competing demands. *Id.* at 224. But while that may be a justification for exclusive representation (having only one union) it is plainly *not* a justification for forcing dissenting employees to compensate that union. Mandatory exclusive representation is plainly not the same thing as—and does not justify—mandatory financial support for an exclusive representative.

3. Because *Abood* is an "anomaly" in the First Amendment landscape, *Knox*, 132 S. Ct. at 2290, the time has come to overturn it. Stare decisis must yield when necessary to "erase [an] anomaly," *Alleyne v. United States*, 133 S. Ct. 2151, 2167 (2013) (Breyer, J., concurring in part and in judgment), or jettison "an outlier." *Id.* at 2165 (Sotomayor, J., concurring). Here, each of the factors this Court generally considers in assessing whether to overturn a prior decision militates in favor of overturning *Abood*.

ARGUMENT

I. State-Mandated Payments To Public-Sector Unions Transgress Core First Amendment Principles.

It is axiomatic that, just as the First Amendment prohibits the government from restricting expenditures of money to engage in speech, it prohibits coercing citizens to financially support speech they oppose. As Thomas Jefferson famously stated, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948). He was echoed by his fellow Virginian, James Madison, who rhetorically asked: "Who does not see ... [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" 2 THE WRITINGS OF JAMES MADISON 186 (Hunt ed. 1901). This Court has therefore long recognized that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high

or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also United Foods*, 533 U.S. at 411 ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.").

Despite this foundational principle, the decision below sanctions a regime that requires unwilling individuals to subsidize the efforts of Respondent SEIU to influence the State's legislators, on the theory that those efforts constitute "collective bargaining" on behalf of "public employees" as opposed to "lobbying." That bargaining-lobbying distinction springs directly from *Abood* and its progeny, which make the constitutionality of compelling payments to unions contingent upon whether the union's persuasion of public officials comes in the form of "lobbying" or "collective bargaining." The parties disagree about which box the activity here falls within, but the dispositive point is that the First Amendment should not depend upon such artificial labels.

Since public-sector "collective bargaining" is unquestionably political speech intended to influence governmental policy, public employment cannot be conditioned on subsidizing that speech any more than it can be conditioned on paying for "lobbying." Compelled financial support for "collective bargaining," like that for "lobbying," conflicts with multiple lines of this Court's jurisprudence—

including its decisions involving unconstitutional conditions, compelled subsidization of speech, and viewpoint discrimination. For that reason, this Court acknowledged two Terms ago that *Abood* is an "anomaly" which failed to give "adequate recognition to the critical First Amendment rights at stake." *Knox*, 132 S. Ct. at 2289-90.

This case vividly demonstrates the gulf between *Abood* and core constitutional principles. It therefore provides a prime opportunity to "revisit" and excise that "anomaly." *Id.*

A. *Abood* Depends Upon An Empty Distinction.

It is undeniable and undisputed that—as *Abood* itself explains—a public-sector union's speech in the course of "collective bargaining" with public officials "may be properly termed political" because it constitutes an "attempt to influence governmental policymaking." 431 U.S. at 231; *see also, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968) (school-district funding "is a matter of legitimate public concern") Forced contributions for public-sector "collective bargaining" therefore constitute compelled subsidization of political speech to the same extent as forced contributions for "lobbying." Both embody mandatory contributions to efforts "influenc[ing] governmental policymaking" and they differ only in their labels. The distinction between these interchangeable concepts—which *Abood* creates and depends upon—is thus wholly artificial.

1. In *Abood*, the Court considered the validity of conditioning public employment on employees making financial contributions to the union responsible for their bargaining unit. The petitioners were public-school teachers who opposed both public-

sector collective bargaining in general and union activities unrelated to collective bargaining. 431 U.S. at 212-13. Citing the Court's prior decisions invalidating unconstitutional conditions on public employment, *Abood* recognized that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Id.* at 234. Finding those principles to be "no less applicable to the case at bar," the majority held that governments cannot require public employees "to contribute to the support of an ideological cause he may oppose as a condition of holding a job." *Id.* at 235. Public employers therefore could not require employees to pay union dues "for political and ideological purposes unrelated to collective bargaining." *Id.* at 232.

When it came to compelled compensation for collective-bargaining efforts, however, *Abood* reached the opposite conclusion, holding that employers *can* mandate such payments. *Id.* at 231. But this distinction between forbidden coercion of dues to support political or ideological speech and permissible coercion of dues to support collective-bargaining speech makes no sense. As *Abood* itself recognized, collective bargaining *is* political or ideological speech that endeavors to influence governmental policymaking. The Court readily acknowledged that decision making for public-sector employers is "above all a political process," *id.* at 228, that implicates deeply held values. "[O]fficials who represent the public employer are ultimately responsible to the electorate," such that "[t]hrough exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives

who sit on the other side of the bargaining table." *Id.* The decision whether or not to "accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service." *Id.*

Consequently, *Abood* recognized "the truism that because public employee unions attempt to influence governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political." *Id.* at 231. This Court has subsequently reiterated that "public-sector union[s] take[] many positions during collective bargaining that have powerful political and civic consequences," *Knox*, 132 S. Ct. at 2289, such that compelling financial support for collective bargaining imposes a "significant impingement on First Amendment rights." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 455 (1984).

2. Once it is recognized—as *Abood* correctly did—that public-sector collective bargaining is itself political speech, it becomes clear that public employment cannot be conditioned on financially supporting that speech. There is no principled reason why political speech in the collective-bargaining context is the one First Amendment right that the government may require citizens to forfeit in order to obtain public employment. Asking public officials to adopt certain policies affecting public employees' benefits and protections is core political

speech regardless of whether the union is seeking those policies in an ordinance or statute, or in a collective-bargaining agreement that will bind future officials. Both forms of speech and both objectives equally implicate employment conditions and public policy issues, and both are equally political. Particularly given that the *raison d'être* of public employee unions is to engage in this political speech, compelled subsidization of that speech—whatever form it takes—infringes the First Amendment rights of dissenting employees.

Notably, *Abood* itself never suggested that there is actually a meaningful distinction between union advocacy to secure a favored ordinance and union advocacy to obtain a preferred contractual provision. Rather, *Abood* permitted the coerced subsidization of public-sector collective-bargaining on the ground that the Court had previously allowed such arrangements in the *private* sector. *See Abood*, 431 U.S. at 232; *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225 (1956). The majority reasoned that "differences between public and private sector collective bargaining simply do not translate into differences in First Amendment rights." 431 U.S. at 232. But that is a non sequitur.

The fact that private employers *not* subject to the First Amendment may do something says nothing about whether *state* actors—who *are* subject to the Amendment—may do the same. That private employers may constitutionally hire or fire employees based on political affiliation or speech about public issues, or engage in naked viewpoint discrimination in their spending or selection policies, hardly

suggests that public entities may do so. *See Elrod*, 427 U.S. at 359 (public employers cannot condition employment on providing "support for the favored political party"); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (viewpoint-based restrictions are forbidden when the government "expends funds to encourage a diversity of views from private speakers" (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (the government may not "leverage its power to award subsidies ... into a penalty on disfavored viewpoints").

Accordingly, contrary to *Abood*, the fact that *Street* and *Hanson* upheld a private employer's decision (permitted but not required by federal law) to condition employment on financial support for unions cannot justify that same coercion by public employers. Obviously, "the government may authorize private parties to enter into voluntary agreements whose terms it could not adopt as its own."[2] *Abood*, 431 U.S. at 250 (Powell, J., concurring

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[2] On this question, *Abood* conclusorily states that the "claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation." 431 U.S. at 226. But since there was no governmental coercion in *Hanson*, the Court could not have *reached* the question of whether government-compelled dues constitute "a First Amendment violation," much less held that they do not. The federal law in *Hanson* was "only permissive," since "Congress ha[d] not compelled nor required carriers and employees to enter into" such agreements. 351 U.S. at 231. It was thus *the private employer's* decision whether to create an agency shop; there was no state-imposed condition to trigger the First Amendment. To the extent *Hanson* discussed First Amendment

in judgment); *see also* Edwin Vieira, *Are Public-Sector Unions Special Interest Political Parties?*, 27 DEPAUL L. REV. 293, 303 (1977-78) ("[I]t is more correct to say that [in *Hanson*], no violation of the First Amendment *can* occur than that one *has not* occurred.").

The permissibility of private-sector agency shops is thus not constitutionally relevant here. And as shown below, it is quite clear that this Court's precedent concerning *public* coercion of speech invalidates that coercion in the collective-bargaining context.

B. *Abood* Conflicts With The First Amendment's Prohibition Of Unconstitutional Conditions.

This Court has long rejected "Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892)). The reason for that rejection is simple: "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.'" *Sindermann*, 408 U.S. at 597 (citation omitted). A long line of decisions reiterate this basic rule, rejecting "the proposition that a public employee has no right to a government job and

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concerns, it brushed them aside as either inapplicable or "not presented by this record." *Id.* at 238.

so cannot complain that termination violates First Amendment rights ...." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996); *see also Umbehr*, 518 U.S. at 673-75 (collecting cases).

The Court's decision in *Elrod*—decided just months before *Abood*—is foundational to this doctrine. *Elrod* considered whether public employers could require public employees uninvolved in policymaking to join a particular political party. The Court held that because a state cannot mandate association with a political party generally, it cannot condition public employment on the same. "The financial and campaign assistance that [employees are] induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief." 427 U.S. at 355 (plurality op.); *see also, e.g.*, *id.* at 359 (Brennan, J., plurality) ("The threat of dismissal for failure to provide [] support [for a political party] unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise."); *id.* at 375 (Stewart, J., concurring in relevant part); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) (states cannot bar members of Communist Party from public employment).

2. By allowing government officials to condition public employment on supporting a union's "political" activities, *Abood* created an irreconcilable conflict with *Elrod*, as four Justices recognized at the time. Justice Rehnquist explained that he was "unable to see a constitutional distinction between a governmentally imposed requirement that a public

employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union." 431 U.S. at 243-44 (Rehnquist, J., concurring); *see also id.* at 242 ("Had I joined the plurality opinion in *Elrod v. Burns*, I would find it virtually impossible to join the Court's opinion in this case."). Justice Powell, in a special concurrence joined by Chief Justice Burger and Justice Blackmun, likewise recognized that *Abood* should have simply been *Elrod II*: "I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of greater deference, when challenged on First Amendment grounds, than its decision to adhere to the tradition of political patronage." *Id.* at 260 n.14 (Powell, J., concurring in judgment). After all, "[t]he public-sector union is indistinguishable from the traditional political party in this country." *Id.* at 257; *see also* Vieira, *supra*, at 376 (public-sector unions are "special interest political parties, both without and (especially) with regard to their participation as exclusive representatives in the inherently political process of compulsory public-sector collective bargaining").

3. This Court's decision in *Pickering* further illustrates the conflict between *Abood* and this doctrine. There, the Court held that the First and Fourteenth Amendments prohibited firing a public-school teacher for criticizing district leadership's efforts to raise revenue. The Court explained that it had "unequivocally rejected" the idea that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest

in connection with the operation of the public schools in which they work." 391 U.S. at 568. As a result, the First Amendment bars public employers from firing employees based on speech regarding "matters of public interest." *Id.*

Abood was simply the flip side of *Pickering*, yet the Court came to the opposite result. While *Pickering* invalidated a *prohibition* of teacher speech concerning matters related to public employment (there, a district's efforts to raise revenue), *Abood* permits compelling teachers to *support* union speech on those *same* topics. But it is a bedrock principle that compelling speech and prohibiting speech are equally offensive to the Constitution: "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988); *see also Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (invalidating "a state measure which forces an individual ... to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable"); *Barnette*, 319 U.S. at 634 (refusing "to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind"). There is no way to reconcile these decisions, one of which protects the decision "what to say" (*Pickering*), while the other gives no protection to the decision "what not to say" (*Abood*).

4. *Abood* not only transgresses *Elrod* and its progeny, but actually sanctions a far more substantial burden on First Amendment freedoms than anything at issue in those cases.

First, coercing an individual to join a particular political party imposes a less substantial burden than the mandatory payments at issue here. Registering as a member of a particular party requires no expenditure of time or money and leaves the employee entirely free to support the candidates and views that employee prefers. Here, by contrast, Petitioners are coerced not just to symbolically associate with a political entity they reject, but to financially subsidize that entity's political advocacy in conflict with their beliefs. In addition to inflicting economic injury, that subsidization both *increases* speech extolling a contrary viewpoint and *diminishes* Petitioners' ability to express their views by taking speech out of their pocket and putting it into a union's. Agency-shop laws are thus a much more pernicious intrusion into First Amendment freedoms than the passive-membership mandate *Elrod* invalidated. They are, indeed, more analogous to the infamous practice in Nassau County, New York of requiring state employees to give "1 percent kickbacks of their salaries ... to the county Republican Party to obtain overtime, promotions or other considerations," Roy R. Silver, *G.O.P. Kickbacks Are Charged To 8*, N.Y. Times (Mar. 6, 1976)—a practice that resulted in criminal convictions. *See People v. Haff*, 394 N.E.2d 278 (N.Y. 1979).

Second, *Abood*'s forced-subsidization comes *on top of* the preexisting suppression of individual expression inherent in exclusive representation—a burden wholly absent in *Elrod*. By requiring that every public employee communicate with his employer through a union, agency-shop laws stifle speech before mandatory subsidies even enter the

picture. Collective bargaining addresses the most important issues in many people's professional lives. It resolves topics such as how employees will be evaluated or promoted, who gets fired and who gets to stay, and what conditions will prevail in the workplace. And in the public sector, that process implicates fundamental public-policy issues, such as merit pay, class size, and how many of the government's finite dollars will go to workers rather than other public needs.

Despite all this, dissenting employees are prevented from negotiating employment policies that they believe are beneficial, such as merit-based compensation rather than seniority-based compensation. Those employees must instead accept a union's decision on what employment and other policies are optimal, and are stuck with whatever contract the union negotiates. While it may not independently violate the First Amendment to deny individuals the right to speak for themselves in bargaining, that preliminary restriction on speech certainly exacerbates the constitutional harm of compelling silenced employees to affirmatively support a union's message.

C. *Abood* Conflicts With The First Amendment's Prohibition Of Compelled Speech.

Abood is irreconcilable not only with *Elrod* and its progeny, but also with this Court's more recent decisions concerning compelled subsidization of speech. This Court's decision in *United Foods*, 533 U.S. 405, in particular, undermines *Abood*'s central premise. There, Congress empowered the Secretary of Agriculture to establish a "Mushroom Council" to oversee efforts to promote the mushroom industry.

The Council was authorized to fund its programs by imposing mandatory assessments on handlers of fresh mushrooms. "[A]lmost all of the funds collected under the mandatory assessments [were] for one purpose: generic advertising" to promote mushroom sales. *Id.* at 412. The respondent in that case objected to this regime because it wanted "to convey the message that its brand of mushrooms is superior to those grown by other producers." *Id.* at 411.

The Court invalidated the mandatory assessments. It began with the premise that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views ... or from compelling certain individuals to pay subsidies for speech to which they object." *Id.* at 410. The Court explained that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *Id.* at 411. The Court made "clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met." *Knox*, 132 S. Ct. at 2289. First, there needs to be "a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy." *Id.* (quoting *United Foods*, 533 U.S. at 414). And second, "even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* (quoting *United Foods*, 533 U.S. at 414). In *United Foods*, those criteria were not met

because "the advertising itself ... is the principal object of the regulatory scheme." 533 U.S. at 411-12.

Abood is irreconcilable with *United Foods* on multiple fronts.

1. Compelled payments to public-employee unions are not *incidental* to an association that is mandated for non-speech reasons—those payments are, rather, compelled for the *express purpose* of supporting union speech in collective bargaining. Unions are thus fundamentally different from, say, bar associations, *see Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990), which are part of a broad regulatory scheme that exists for reasons unrelated to advocacy on particular issues, with speech comprising a minor, incidental component of the organization's purpose. While unions do serve non-speech functions (grievance representation, training programs, etc.), there is no serious question that collective bargaining—*i.e.*, speech—is the dog while the union's other duties are the tail. *Abood* thus collides headlong with the Court's refusal to uphold "compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods*, 533 U.S. at 415.

The facts of *United Foods* capture this conflict. There, one mushroom producer objected to compelled subsidies for speech that promoted all mushrooms alike. *Id.* at 409. The objecting producer wanted to promote its mushrooms as being better than the rest, and thus objected to "being charged" for "[t]he message [] that mushrooms are worth consuming whether or not they are branded." *Id.* at 411. *Abood* involves the same dynamic: a mandated association that exists to promote "a message which seems to be

favored by a majority of [public employees]" and which therefore promotes one conception of the collective good. *Id.* Like mushroom growers confident in the quality of their mushrooms, employees who believe they have superior skills object to collective-bargaining contracts geared toward protecting middling employees at their expense. Those employees' First Amendment rights are thus violated just as much as the successful mushroom grower when they are forced to promote the union's message exalting the average. As *United Foods* explained, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *Id.*

2. Indeed, *Abood* sanctions a compelled-speech regime that is more egregious than that in *United Foods*. Foremost, mandatory subsidization of public-sector bargaining involves *core political speech*, whereas *United Foods* involved "commercial speech," which the Court assumed is "entitled to lesser protection." *Id.* at 410. "Core political speech occupies the highest, most protected position" in the First Amendment hierarchy. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment).

Moreover, the regime in *United Foods* did not silence dissenting mushroom producers. Such producers remained free to run ads touting the superiority of their mushrooms. Here, by contrast, the State's law precludes Petitioners from bargaining for themselves. *See supra* at 17-18. As a result, Petitioners have no mechanism for meaningfully engaging in speech that counters the union message

they already have to subsidize. That combination of forced silence *and* forced subsidization exacerbates the First Amendment problem.

D. *Abood* Conflicts With The First Amendment's Prohibition Of Viewpoint Discrimination.

Finally, *Abood* permits states to engage in clear-cut viewpoint discrimination—the most "egregious" form of First Amendment regulation. *Rosenberger*, 515 U.S. at 829. *Abood* recognized that public employees "may very well have ideological objections to a wide variety of activities undertaken by the union," and may "believe[] that a union representing [them] is urging a course that is unwise as a matter of public policy." 431 U.S. at 222, 230. But it nevertheless held that states can promote unions' messages by compelling every public employee to support them.

There is no question that state-mandated support for union speech constitutes viewpoint discrimination. A case decided just before *Abood* confirms as much. In *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-76 (1976), the Court rejected union efforts to preclude a dissenting teacher from addressing a school board on the merits of the union's collective-bargaining proposal. The Court explained that "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *Id.* Agency-shop laws do precisely that by compelling dissenting employees to

support *the union's* "side" on "debatable public question[s]." *Id.*[3]

This discrimination has the effect of skewing all bargaining-related speech in favor of union viewpoints. The most basic issues that unions address—wages, pensions, hours—implicate matters of public concern, affecting "the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates." *Abood*, 431 U.S. at 258 (Powell, J., dissenting).[4] The First Amendment forecloses skewing those fundamental debates absent a compelling interest. States do not have "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

II. Public-Sector Agency-Shop Laws Cannot Survive "Exacting" First Amendment Scrutiny.

For all of these reasons, it is clear that the *Abood* regime must be subjected to "exacting" First Amendment scrutiny. *Elrod*, 427 U.S. at 363. To

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[3] Countless decisions have recognized that pro-union speech is a distinct viewpoint. *See, e.g., Carey v. Brown*, 447 U.S. 455, 468 (1980) (overturning statute that forbade picketing except that relating to a labor dispute, and rejecting as "illegitimate" the statute's "desire to favor one form of speech over all others"); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 356 (6th Cir. 1998) (restricting pro-union speech "offends the values underlying the First Amendment"); *Metro Display Adver., Inc. v. City of Victorville*, 143 F.3d 1191, 1195 (9th Cir. 1998) (rejecting effort at restricting pro-union speech).

[4] The fact that public-sector unions are highly partisan entities, *infra* at III.D, makes the viewpoint discrimination even more stark.

survive that scrutiny, public-sector agency-shop laws "must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.* These laws—with the Illinois regime as a banner example—cannot possibly survive heightened review. *Abood* mentions two supposed justifications for compelling public employees to support union speech: (1) preventing "free-riding," and (2) preserving "labor peace." Once the Court gives "adequate recognition to the critical First Amendment rights at stake," *Knox*, 132 S. Ct. at 2289, both justifications crumble.

A. Preventing "Free-Riding" Does Not Justify Compelled Payments To Unions.

The "primary purpose" for compelled subsidization of public-sector unions is to prevent "nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 551 U.S. at 181. That interest cannot justify the serious First Amendment burdens *Abood* permits.

1. At the threshold, the government's determination that an advocacy group's controversial viewpoints "benefit" dissenting individuals cannot possibly justify forcing those individuals to support the group. Even the *Abood* cases flatly reject the notion that "free-riding" could justify compelled subsidization of "legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991). The

Court has thus prohibited "lobbying" subsidies even though the potential for "free-riding" is the same as it is for bargaining.

The rejection of a "free-riding" justification in the lobbying context makes sense, of course, because "free-rider arguments" are "generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289. Countless groups petition on behalf of discrete sectors of society, with purported benefits inuring to the entire sector. The First Amendment nonetheless prohibits governments from requiring every beneficiary of those groups' efforts to compensate them, even if that robust lobbying is beneficial. It would be clearly unconstitutional, for example, for Congress to mandate that senior citizens support the AARP. Similarly, as *Knox* noted, a PTA is not entitled to compensation from all parents any time it raises funds for a school-related cause. *Knox*, 132 S. Ct. at 2289 (citing Summers, *Book Review, Sheldon Leader, Freedom of Association*, 16 COMP. LAB. L.J. 262, 268 (1995)).

Professional organizations—which are identical to public-sector unions in all material respects—confirm the point. The American Nurses Association ("ANA"), for example, is a private organization that works to advance nurses' interests by, among other things, lobbying legislatures. The ANA's objectives and methods are no different from what Respondent SEIU does here—it seeks to persuade legislators to take action on issues like the prevention of mandatory-overtime policies, or the establishment of minimum nurse-staff ratios. Nurses who decline to become dues-paying members of the ANA "free-ride" off its efforts in precisely the same sense that

dissenting employees "free-ride" here. Yet the government obviously could not compel every nurse to subsidize this advocacy organization. Preventing "free-riding" thus does not justify compelled subsidization of political speech.

2. But even if "free-riding" somehow could overcome the First Amendment, that rationale would remain particularly illogical where, as here, the "free-rider" supposedly benefitting from the union message *disagrees* with that message. *See Abood*, 431 U.S. at 231 ("Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs."). Numerous examples illustrate how union demands concerning core workplace issues frequently *harm* dissenting employees. For example, unions regularly bargain for compensation based on seniority rather than merit, and therefore privilege long-time employees over newer employees who may be more talented. Similarly, unions tend to seek tenure provisions that effectively redistribute compensation from the most talented teachers to the difficult-to-fire ones. And in the policy realm, teachers unions bargain over basic matters of education policy, such as class size, even though many teachers reasonably disagree with the unions' preferences concerning education policy. In each of these instances—and countless others—the union's bargaining efforts impose harm on some employees to benefit others. Those injured employees are plainly not "free-riding" in any comprehensible conception of the term.

Because *Abood* focused chiefly on disagreements at the periphery of collective bargaining, however, it is conceivable that the Court believed dissenters

disagree only with a union's expression at that periphery, such as an employee's "moral or religious views about the desirability of abortion," which "may not square with the union's policy in negotiating a medical benefits plan." 431 U.S. at 222. This characterization is not only factually inaccurate for the reasons noted above, it is also legally irrelevant.

Once it is established that employees "have ideological objections" to a union's efforts, *id.*, the First Amendment does not permit picking and choosing among those objections to decide which are really worth protecting. It makes no difference from the First Amendment's perspective whether dissenters disagree with 100%, 10%, or 1% of the speech they are compelled to support, or even if they just disagree with the basic concept of compelled speech. A state could not mandate financial support for the Republican Party even if it limited that mandate to registered Republicans. The fact that those Republicans might agree with all or most of what the Party espouses—and thus might derive benefit from the Party's advancement of their ideals—makes no difference. This is particularly clear because money is fungible and there is thus no way to "limit" the dissenting employees' contributions to those collective bargaining provisions that the employees "support."

3. Dissenting employees do not "free-ride" on union bargaining efforts for yet another reason: the most important labor protections for public employees are typically already enshrined in legislative enactments that supersede any collective-bargaining agreement. In order for "free-riding" to justify mandatory annual payments, there needs to

be an actual benefit from collective bargaining that dissenting employees "free-ride" on, and it must be distinct from the union lobbying efforts for which they cannot be charged. In virtually all instances, however, statutes and civil-service protections *already* provide the most important benefits that bargaining could obtain.

The California public-education system, where the individual *amici* teach, proves as much. There, the legislature has passed numerous statutes that resolve issues which would otherwise be subjects of collective bargaining. Those statutes provide, for instance, that teachers become "permanent employees"—*i.e.*, receive tenure—"after having been employed by the district for two complete consecutive school years." Cal. Educ. Code § 44929.21(b). Other statutes require districts to follow a complex procedure in order to terminate an employee (§§ 44934, 44938(b)(1), (2), 44944); provide that the teachers terminated first must always be the teachers hired most recently (*i.e.*, "last in, first out") (§ 44955); and set standards for class size (§ 41376).

Because California law resolves these fundamental issues, it limits what the unions can bargain about, leaving little for dissenting employees to "free-ride" upon. California teachers could quite rationally conclude that these statutes provide sufficient employment protection, such that there is no reason to pay local, state, and national unions as much as $1,000 annually to compensate them for bargaining over whatever minor issues remain. Surely the state's interest in preventing "free-riding" is diminished when the cost of the ride far exceeds its benefits.

4. The disconnect between the "free-riding" justification and the reality of *Abood* is further highlighted by the huge portion of union payments that flow to national organizations with no connection to local collective bargaining.[5] It is difficult to see how the need to prevent "free-riding" on local bargaining efforts could justify the compulsion of large payments to multi-hundred-million-dollar state and national organizations that play no direct role in that local bargaining. On the other hand, it is easy to see how this broad authorization to extract large payments from all public employees provides substantial assistance to the unions in furthering their non-bargaining-related political objectives—most of which are orchestrated by the state and national organizations rather than their local chapters.

B. The Interest In "Labor Peace" Does Not Justify Compelled Payments To Unions.

The second state interest that *Abood* suggests justifies mandatory payments to public-sector unions is the "desirability of labor peace." 431 U.S. at 224. By that *Abood* meant the prevention of "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* This interest, too, is facially insufficient to justify compelled political speech, for at least two reasons.

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[5] For example, in *Lehnert*, which approved this use of compelled fees, $259 of the $284 service fee—or 91%—went to State and National teachers' unions, rather than the local. 500 U.S. at 512-13.

The state's interest in bargaining with *one* union (rather than many) does not justify compelling dissenting teachers to support that one union's speech. The potential "conflict" between rival unions disappears once one union is designated. Compelling dissenting employees to contribute to that designated union does nothing to ameliorate that already-eliminated conflict. The interest in "labor peace" thus cannot justify compelled subsidization even if it can justify exclusive representation.

Moreover, if anything, the designation of a single speaker is a good reason to *not* require dissenters to subsidize that state-designated exclusive voice. The designation of a single speaker already precludes the dissenter from meaningfully conveying his views about workplace terms and conditions to his public employer. *See supra* at 17-18. Moreover, as *Abood* noted, even different *unions* hold "quite different views" on core collective-bargaining topics like "proper class hours" and "tenure," 431 U.S. at 224. Thus, even within the "pro-labor" community, there is wide disagreement concerning the topics of collective bargaining. The designated union-speaker is therefore not advancing views that *benefit* allegedly "free-riding" dissenters if those dissenters subscribe to the "quite different view" of a defeated union.

III. *Abood* Should Be Overturned.

Abood is thus an extreme "anomaly" on multiple fronts. 132 S. Ct. at 2290. The Court should take this opportunity to overturn that decision and restore harmony to the First Amendment. *Abood* amply satisfies the factors typically used to determine whether a precedent should be overturned. *See*

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (reciting the factors).

A. *Abood* Is Unworkable.

Because *Abood* recognizes that it would be unconstitutional to compel subsidization for political speech non-germane to collective bargaining, it forces courts to draw an unworkable line between political "bargaining" speech and all other political speech.

There is no principled difference between these categories of political speech. Unions frequently lobby state legislatures to preserve and expand statutory employment terms and protections like those noted above. That activity—non-chargeable under *Lehnert*, 500 U.S. at 522—is materially indistinguishable from Respondent SEIU "bargaining" with the Illinois legislature over homecare-provider issues, or a California teachers' union bargaining with local officials for protections similar to those provided by California statutes. *Lehnert* prohibited unions from demanding compensation for lobbying on the ground that "[t]he balancing of monetary and other policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life." *Id.* at 521 (plurality op.). This point applies with equal force to public-sector collective bargaining.

Justice Marshall made precisely that point in *Lehnert*, demonstrating the absurdity of distinguishing among "lobbying," "bargaining," and "lobbying about bargaining." As he explained, the majority opinion "would permit lobbying for an education appropriations bill that is necessary to fund an existing collective-bargaining agreement, but

it would not permit lobbying for the same level of funding in advance of the agreement, even though securing such funding often might be necessary to persuade the relevant administrators to enter into the agreement." *Lehnert*, 500 U.S. at 537 (Marshall, J., concurring in part and dissenting in part). Justice Marshall also noted that the supposed interest in preventing "free-riding" applies with equal force to both lobbying the legislature to "increase[] funding for education" (non-chargeable) and to lobbying the legislature for "ratification of a public sector labor contract" (chargeable). *Id.* at 538 (emphasis omitted). In both instances, dissenting employees might "disagree with the trade-off the legislature has chosen," but are equally obligated to "shar[e] the union's cost of obtaining benefits for them." *Id.*; *see also id.* (if a "lobbying program succeeds in generating higher funding for professors and teachers in the public sector, [dissenting employees] will surely benefit along with the other members of their bargaining unit").

The facts of *Knox* reinforce the unworkability of this line. There, the SEIU—the same union affiliated with Respondent here—defended its decision to charge nonmembers for multiple categories of speech that fall in the absurd middle between *Abood*'s twin holdings. For example, the SEIU argued "broadly that all funds spent on 'lobbying ... the electorate' are chargeable." 132 S. Ct. at 2294-95 (citations omitted). The Court rejected this assertion, explaining that accepting it "would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities." *Id.* at 2295. But the SEIU's charges in *Knox*—while obviously political—are not

fundamentally distinct from the compelled speech *Abood* permits. Indeed, the referendum that SEIU used compelled fees to oppose "would have limited state spending and would have given the Governor the ability under some circumstances to reduce state appropriations for public-employee compensation." *Id.* at 2285. Yet even though the referendum "would have 'effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances,'" *id.* at 2295—such that it pertained *directly* to bargaining—seven Justices agreed that SEIU could not fund its opposition with dissenters' fees. That decision was correct, of course, but it is difficult to square with *Abood*'s broad authorization for compelled subsidization of bargaining-related speech; speech that likewise has "powerful political and civic consequences." *Id.* at 2289.

B. No Entity Has A Valid Reliance Interest In *Abood*.

No reliance interests counsel against overturning *Abood*. "[T]he union has no constitutional right to receive any payment from" nonmembers. *Knox*, 132 S. Ct. at 2295. The unions' only interest is in receiving as much money as possible, at the expense of the nonmembers whose constitutional rights are at stake. Reliance interests in perpetuating a First Amendment violation cannot possibly justify the continuation of an anomalous precedent.

C. Subsequent Developments Have Confirmed That *Abood* Is An Anomaly.

The purpose of compelled subsidies is to promote union speech. As this Court has explained: "The primary purpose of [agency-shop] arrangements is to

prevent non-members from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 551 U.S. at 181. That makes sense, since collective bargaining—*i.e.*, speech—is the overriding purpose of unions.

Whenever this Court has grappled with *Abood* in the compelled-speech context, however, it has described it in much-different terms that suggest—contrary to *Abood*, *Davenport*, and other post-*Abood* decisions—that unions are *not* fundamentally advocacy groups. For example, in *Keller*, the Court drew "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members on the other." 496 U.S. at 12. Later, in *United Foods*, the Court explained that governments can compel speech only when there is an "overriding associational purpose" independent from the compelled speech, 533 U.S. at 413, and dealt with *Abood* by explaining that, there, "[t]o attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association." *Id.* at 414.

These opinions elide the fact that a union's overriding purpose is to obtain "benefits" through "collective bargaining," with compelled fees necessary to "shar[e] the costs incurred." *Davenport*, 551 U.S. at 181. Unions are fundamentally about *bargaining* and bargaining fundamentally *is* speech. Unions thus differ from bar associations—which exist primarily for the non-expressive purpose of

regulating the legal profession—and mandatory association with unions has no purpose "independent from the speech itself." *United Foods*, 533 U.S. at 415. The fact that this Court has been able to reconcile *Abood* with its compelled speech cases only by characterizing collective bargaining as a non-speech activity confirms that *Abood* is "a mere survivor of obsolete constitutional thinking." *Casey*, 505 U.S. at 857.

D. Factual Developments Since *Abood* Have Confirmed That That Decision Lacks An Adequate Justification.

Finally, factual developments "have robbed the old rule of significant application or justification," *Casey*, 505 U.S. at 855, and cemented *Abood*'s outlier status. Whatever role unions once played, contemporary public-sector unions are powerful political actors that have profound influence over state and local governments. The modern public-sector union is indistinguishable from a political party. It is an advocacy organization that pushes its views to the exclusion of all others, often in a highly partisan fashion.

The facts of this case prove as much. The forced unionization of homecare providers was the result of executive action by then-Governor Blagojevich. Pet. Br. at 9. The Governor (correctly) recognized that requiring additional compelled payments to the Respondent SEIU would increase that union's political power in Springfield, with a concomitant benefit to himself and other Illinois Democrats. Thus, mere months after taking office—fueled in part by $800,000 in contributions from various entities of Respondent SEIU—Governor Blagojevich signed the

executive order requiring homecare providers to engage in collective bargaining through an exclusive representative. Kris Maher & David Kesmodel, *Illinois Scandal Spotlights SEIU's Use of Political Tactics*, Wall St. J., (Dec. 20, 2008), http://online.wsj.com/news/articles/SB122973200003022963. This paved the way for Respondent SEIU to become the representative for roughly 20,000 homecare providers and to establish an agency-shop arrangement with the State, with a resulting influx of roughly $3.6 million in annual fees. Pet. Br. at 10.

As these facts illustrate, there is no principled difference between requiring Petitioners to make payments to Respondent SEIU and requiring them to make payments to the Illinois Democratic Party. Both are equally and extremely offensive to dissenting employees. The latter would be unquestionably unconstitutional, even if Democratic Party staff lobbied the Illinois legislature on behalf of Petitioners, and even if the charges were limited to compensating the Democratic Party for those lobbying efforts. That is because the Democratic Party has a particular viewpoint; because lobbying (or "bargaining" with) the State legislature is a political activity; because this Court has consistently held that "[a] State may not condition public employment on an employee's exercise of his or her First Amendment rights," *O'Hare Truck Serv.*, 518 U.S. at 717; because "the principal object" of that mandate is "speech itself," *United Foods*, 533 U.S. at 415; and because no government may give "one side of a debatable public question an advantage in expressing its views to the people," *First Nat'l Bank of Boston*, 435 U.S. at 785.

Whatever bases once existed for distinguishing *Elrod*, reconciling *United Foods*, and evading the prohibition of viewpoint discrimination, those distinctions have crumbled over time. Even if *Abood*'s constitutional rule originally had merit—and there is good reason to doubt that, *see* Petitioner's Br. at 18-24—it has not withstood the test of time.

CONCLUSION

The Court should overturn *Abood* and reverse the judgment of the court of appeals.

Respectfully submitted,

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No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CATO INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state may, consistent with the First and Fourteenth Amendments to the Constitution, compel public employees to support a labor union as their exclusive representative for collective bargaining.

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INTEREST OF THE *AMICI*[1]

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[1] Pursuant to Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae*, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

ation, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that impact small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court candidly observed in *Knox* that its "acceptance of the opt-out approach" for dissenting employees forced to financially support a labor union against their will "appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2290 (2012). The same can and should be said of the Court's acceptance of "labor peace" as a state interest so compelling that a state may mandate its employees' association with a labor union, force them to subsidize its speech, and compel them to submit to it as their exclusive representative for petitioning government for redress of grievances regarding the conditions of their employment as state workers—invariably matters of public concern.

The "labor peace" rationale for infringing employees' First Amendment rights rests on the flimsiest of structures. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), simply assumed that the Court's de-

cisions in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961), had already recognized "labor peace" as a First Amendment "compelling interest." But those cases regarded "labor peace" only as justifying Congress's exercise of its Commerce Clause authority to regulate labor relations, not as a basis to override workers' First Amendment rights. In fact, careful review of the Court's precedents shows that, prior to *Abood*, it had never squarely addressed the First Amendment rights of employees to be free from compelled association with and coerced support of a labor union. *Abood's* assumption to the contrary was incorrect.

Its holding on that point is also unsupportable. As *Abood* recognized, the very purpose of forcing dissenting employees to associate with a labor union is to facilitate its speech on their behalf, while suppressing their individual views, and thereby to achieve "labor peace." 431 U.S. at 224. But the First Amendment does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791, 795 (1988). The State of Illinois' transparent scheme to compel personal homecare providers to associate with and subsidize a labor union absent any legitimate state interest is the predictable result of *Abood's* casual disregard of public employees' First Amendment rights. *Abood* was wrong when it was decided and still cannot be reconciled with the

Court's cases recognizing "the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment." *Knox*, 132 S. Ct. at 2288. It should be overruled now to put an end to the wholesale violation of public workers' First Amendment rights.

Even if the Court is unwilling to recognize at this time that "labor peace" was never a persuasive justification to countenance the violation of public workers' First Amendment rights, it should still reject the State of Illinois' scheme because it is unsupported by any compelling state interest. Whatever a government's interest in furthering "labor peace," that interest is not at all implicated where the government does not manage its putative "employees" and exercises no control over their working conditions. To hold otherwise would distort *Abood* far beyond its holding and logic, allowing the government to forcibly "organize" any recipients of state subsidies.

ARGUMENT

I. "Labor Peace" Is Not a First Amendment Compelling Interest

Abood held that *Hanson* and *Street's* recognition of "labor peace" as an "important" government interest "presumptively support[s] the impingement upon associational freedom" inherent in compelling public employees to support a labor union. 431 U.S. at 225. But what *Abood* took to be settled law was, in fact, nothing of the sort. Prior to that errant decision, the Court had never recognized "labor peace" as an in-

terest that is *per se* sufficiently compelling to override employees' First Amendment rights. The slightest scrutiny demonstrates that it is not. *Abood's* holding to the contrary should be overruled.

A. The "Labor Peace" Doctrine: Another "Historical Accident"

To the extent that there is a "labor peace" doctrine, it concerns Congress's authority under the Commerce Clause to regulate labor relations, not employees' First Amendment rights.

1. "Labor Peace" Emerges as a Commerce Clause Doctrine

The "labor peace" concept first appeared in the Court's 1917 case *Wilson v. New*, 243 U.S. 332, 342, 348 (1917), which challenged Congress's authority to set the hours of work and wages of railroad employees so as to settle a nationwide railroad-worker strike that threatened to "interrupt, if not destroy, interstate commerce." In those circumstances—"that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent"—the Court found that Congress's exercise of power was appropriate. *Id.* at 347-48.

A 1937 decision, *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937), extended that holding more generally to the regulation of railroads'

labor relations. The defendant was a railroad that refused to recognize the union that shop craft employees had chosen in a government-supervised election pursuant to the Railway Labor Act. The railroad argued that the Act, "in so far as it attempts to regulate labor relations between [itself] and its 'back shop' employees, is not a regulation of interstate commerce authorized by the commerce clause because . . . they are engaged solely in intrastate activities." *Id.* at 541. Citing evidence of disruptive strikes, "industrial warfare" between the railroads and their employees, and the phenomenon of "general strikes," the Court found the Act to be an appropriate means of "settl[ing] industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement." *Id.* at 553.[2]

That same year, the Court upheld the National Labor Relations Act (NLRA) on "industrial peace" grounds. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), was a broadside attack on Congress's power under the Commerce Clause to regulate labor relations generally. The respondent, a major iron and steel manufacturer, challenged both the

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[2] *See also id.* at 556 ("Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation.")

scope of the Act and the Act's application to its operations, contending that its business was not a part of the "stream of commerce" and therefore was outside of Congress's reach. The Court disagreed, based on the "effects" on interstate commerce of labor discord in the respondent's business:

> [T]he fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id. at 41. Congress had therefore acted appropriately to facilitate employee representation, it held, because "collective bargaining is often an essential condition of industrial peace." *Id.* at 42.

The Court quickly came to view promoting "industrial peace" or "labor peace" as the fundamental policy and purpose of the NLRA, interpreting and applying the Act in dozens of cases with that goal in mind. *See, e.g., N.L.R.B. v. Fansteel Metallurgical Corp.*,

306 U.S. 240, 257 (1939) ("[T]he fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce . . . ."); *N.L.R.B. v. Local Union No. 1229, Intern. Broth. of Elec. Workers*, 346 U.S. 464, 476 (1953) (rejecting application of Act contrary to its "declared purpose of promoting industrial peace and stability"). None of these cases involved employees' First Amendment rights, until *Hanson*.

2. Hanson *and* Street *Skip Past the Central First Amendment Question*

But *Hanson*, a challenge by railway employees to a union-shop arrangement under the Railway Labor Act, also did not suggest that "labor peace" has anything to do with speech or associational rights. Instead, it used "labor peace" in exactly the same manner as its predecessors. A threshold issue was whether the federal Act could preempt a conflicting provision of the Nebraska Constitution that barred union-shop arrangements. 351 U.S. at 233. Citing *Jones & Laughlin Steel*, the Court found the question an easy one: "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." *Id.* at 233. That is it for "labor peace" in *Hanson*.

In fact, *Hanson* has little or nothing to say about the kind of First Amendment argument raised in *Abood* and in the present case. To begin with, the

employees actually did not challenge Congress's authority *vel non* to authorize union-shop agreements consistent with the limitations of the First Amendment. Instead, they argued that the Act infringed their speech and associational rights because they were "compelled not only to become members of the union but to contribute their money to be used in the name of the membership of the union for propaganda for economic or political programs which may be abhorrent to them." Br. of Appellees Robert L. Hanson, *et al.*, at 25, *Railway Employees' Dep't v. Hanson* (filed April 18, 1956).[3] *See also Machinists v. Street*, 367 U.S. 740, 747 (1961) (describing the argument in *Hanson* as challenging the constitutionality of "compelling an individual to become a member of an organization with political aspects [as] an infringement of the constitutional freedom of association, whatever may be the constitutionality of compulsory

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[3] The brief goes on to specify the kinds of practices to which the employees objected:

> [U]nder the union shop the involuntary union member is compelled to contribute his money to pay for union propaganda for economic and political ideas and ideals which may be abhorrent to him. He is compelled to contribute money which the union may donate to religious organizations with whose beliefs he may be in total disagreement. And the propaganda is carried on and the donations made in the name of the union of which he forms a part, under compulsion. The union purports to speak for its membership including conscripts.

Id. at 65.

financial support of group activities outside the political process").

The Court demurred, holding only that, "*[o]n the present record*, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U.S. at 238 (emphasis added). This was because the case was brought before the union-shop agreement at issue went into effect, and so there could not yet be any evidence that the union had expended funds for political purposes. *See id.* at 230; *Street*, 367 U.S. at 747-48 ("the action in *Hanson* was brought before the union-shop agreement became effective"). On that basis, the Court upheld the Act on its face, while reserving the question of whether "the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement" might run afoul of the First Amendment. 351 U.S. at 238.[4]

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[4] The Court also turned back a broader Fifth Amendment "substantive" due process challenge to the Act's authorization of union-shop agreements, holding that "Congress might well believe" (*i.e.*, have a rational basis to believe) that authorizing union shops would best advance the constitutional "right to work." 351 U.S. at 234-35. Notably, that challenge, unlike the employees' First Amendment claim, did ask the Court to rule on whether Congress may authorize union-shop agreements at all, irrespective of whether the union engages or may engage in political activity.

Moreover, the Court skipped past the constitutional question for a separate reason: the attenuation between Congress's action to authorize private parties to enter into union-shop agreements and any injury suffered by employees as a result of those agreements. As the Court stressed, "[t]he union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements." 351 U.S. at 231. The implication, Justice Powell later observed, was that "Congress might go further in approving private arrangements that would interfere with [employees' First Amendment] interests than it could in commanding such arrangements." *Abood*, 431 U.S. at 248 (Powell, J., concurring). As such, the *Hanson* Court had no reason to decide whether the government itself might compel association with or financial support of a union consistent with the First Amendment.

Street faced the same narrow question as *Hanson*—whether "First Amendment rights would be infringed by the enforcement of an agreement which would enable compulsorily collected funds to be used for political purposes," 367 U.S. at 747—but on a developed record. Recognizing this as a question "of the utmost gravity," the Court avoided constitutional doubt by construing the Act to "den[y] the authority to a union, over the employee's objection, to spend his money for political causes which he opposes." *Id.* at 749-50. Such expenditures, it held, "fall[] clearly outside the reasons advanced by the unions and ac-

cepted by Congress why authority to make union-shop agreements was justified" and so should be considered to fall outside of the Act's authorization. *Id.* at 768.

Taken together, *Street* and *Hanson* stand for the proposition that Congress's authorization of agreements requiring employees to associate with or financially support a labor union raises serious constitutional concerns when the union is allowed to expend employees' money on political causes over their objection. But neither case resolved the broader question of whether such a law, irrespective of political expenditures by the union, infringes employees' First Amendment rights. The one sentence in *Hanson* that might be thought to address the issue, quoted above, refers to "the present record," indicating that it concerns the narrower question of political expenditures, not the broader question of the Railway Labor Act's facial validity under the First Amendment, which would not depend on record evidence. *Street's* description of the issue raised in *Hanson*, also quoted above, confirms the point. 367 U.S. at 747.[5] Nor do those cases resolve whether, beyond

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[5] *Street's* statement that *Hanson* held the Railway Labor Act "constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents" is not to the contrary, taken in context. 367 U.S. at 749. As the preceding sentence describes, *Hanson* held that the Act was "within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Id.* (quot-

authorizing private union-shop agreements, government may *directly compel* association with or support of a union. Finally, neither case so much as suggests that the government's interest in "labor peace" has the least thing to do with employees' First Amendment rights.

3. Abood's *Bait-and-Switch: Substituting a Commerce Clause Doctrine for Any Reasoned First Amendment Analysis*

Abood mangled the Court's precedents beyond all recognition to uphold a mandatory agency shop imposed by the government on public school teachers. *Hanson* and *Street*, it incorrectly assumed, had already established that any "interference" with the First Amendment rights of dissenting employees made to financially support a labor union "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. Not only that, but those cases, it said, "presumptively support the impingement upon associational freedom created by the agency shop here at issue," one directly imposed on public employees by their government. *Id.* at 225.

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ing *Hanson*, 351 U.S. at 238). But that goes only so far: *Hanson* ruled on the narrower First Amendment claim, regarding political expenditures, that was before it but did not address the waterfront of possible First Amendment claims, including the charge that, irrespective of political spending by unions, the Act infringes employees' First Amendment rights.

Abood also incorrectly characterized those cases' First Amendment holdings as resting upon the government's interest in maintaining "labor peace." Mixing and matching from different parts of the Court's opinion in *Hanson*, and paraphrasing when even that was insufficient to its ends, *Abood* cobbled together an entirely new doctrine of First Amendment law:

> Acknowledging that "(m)uch might be said pro and con" about the union shop as a policy matter, the Court noted that it is Congress that is charged with identifying "(t)he ingredients of industrial peace and stabilized labor-management relations." Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one.

Id. at 219 (quoting *Hanson*, 351 U.S. at 233-34).

And this new doctrine, it held, recognized no distinction between Congress's authorization of private-sector union-shop agreements, as at issue in *Hanson* and *Street*, and the government compelling its own employees to associate with and support a union. Finding no actual support for this proposition in either precedent, it could only cite Justice Douglas's attempt to refashion *Street's* narrow holding into a broad principle that collective action overrides the

individual rights expressly guaranteed by the First Amendment: "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 222-23 (quoting *Street*, 267 U.S. at 778 (Douglas, J., concurring)). At the time, Justice Douglas's dismissive approach to the First Amendment had garnered the support of no other justice; in *Abood*, the Court accepted it as *Hanson's* central holding and therefore settled law.

B. *Abood's* Reliance on "Labor Peace" Conflicts with First Amendment Principles Prohibiting Compelled Speech and Association Absent a Substantial Non-Expressive Government Interest

In so doing, *Abood* departed spectacularly from settled First Amendment principles.

Abood's chief error in law mirrors its misunderstanding of the Court's labor-law precedents. *Hanson* and *Street* held that the effects of "labor peace," or the lack thereof, on interstate commerce were sufficient to support the exercise of Congress's Commerce Clause power—an exceedingly low bar. To uphold such an exercise, the Court considers only "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 557 (1995). Essentially the same standard applies to due

process claims concerning the regulation of economic activity. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955). That Congress could authorize union-shop agreements under its Commerce Clause power, and that its doing so was not barred by the Fifth Amendment's Due Process Clause, *see supra* n.4, are logically irrelevant to whether its action clears the higher bar of First Amendment exacting scrutiny. *Abood's* bait-and-switch on this point—substituting a Commerce Clause doctrine for any kind of reasoned First Amendment analysis—is unsupportable.

So is its bottom-line holding that government's interest in promoting "labor peace" is substantial or compelling. The whole point of a labor union is to express certain views through both speech and association. Under an agency-shop agreement, a union "is designated the exclusive representative of those employees" that are compelled to support it. *Abood*, 431 U.S. at 224. It that capacity, it speaks on their behalf, and through their association with it, employees are bound by that speech, whether or not they agree with it. *Abood* recognized, with respect to a teachers' union, that this association serves specifically to suppress the speech of dissenting employees who may hold "quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures." *Id.* *Abood* regarded this as a *virtue* of compelled association with a union.

The First Amendment does not. Instead, as in nearly all other areas, "[t]he First Amendment man-

dates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). The government "may not substitute its judgment as to how best to speak for that of speakers and listeners." *Id.* at 791. Nor does the First Amendment permit it to "sacrifice speech for efficiency." *Id.* at 795. Straightforward application of these basic principles disposes of any argument that the government has a compelling interest in furthering "peace" between employers and their employees.

In particular, the Court has long adhered to Thomas Jefferson's dictum that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 12 (1947); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 305 n.15 (1986); *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990). Accordingly, it has recognized that the "freedom of speech" guaranteed by the First Amendment "may prevent the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods*, 533 U.S. 405, 410 (2001) (citations omitted). Because "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors,"

schemes that compel such subsidies "must pass First Amendment scrutiny." *Id.* at 411. At the very least, the government's interest must be substantial, and the compulsion tailored to achieve that interest. *See id.* at 409-10 (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

Similarly, the Court has recognized that the freedom of association guaranteed by the First Amendment "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood*, 431 U.S. at 234-35). That freedom may be impinged only by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*; *Knox*, 132 S. Ct. at 2289 (same); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (same); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) ("exacting scrutiny"). This is a balancing test: "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Boy Scouts*, 530 U.S. at 658-59.

And, consistently, even indisputably important state interests—eradicating discrimination, assuring equal access to places of public accommodation—have been found to be outweighed by the burden of government intrusion on associations that are, themselves, expressive. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574-75 (1995); *Boy Scouts*, 530 U.S. at 559.

With equal consistency, the Court has upheld those laws that impose no "serious burden" on expressive association. *See Boy Scouts*, 530 U.S. at 658-59 (discussing cases); *New York State Club Assn. v. City of New York*, 487 U.S. 1, 13 (1988) (challenged antidiscrimination law "no obstacle" to club excluding "individuals who do not share the views that the club's members wish to promote"); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (challenged law "does not force a law school 'to accept members it does not desire'").

Merely invoking "labor peace" cannot justify compelling employees to financially support a union. While the government may compel the subsidization of speech when necessary to carry out "a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy," *Knox*, 132 S. Ct. at 2289 (citing *United Foods*, 433 U.S. at 414), it must have some object in mandating the association beyond the speech itself, lest the exception swallow the general rule. In other words, compelled association must be incidental to some legitimate government interest. *United Foods*, 533 U.S. at 413-15 (rejecting "compelled subsidies for speech in the context of a program where the principal object is speech itself"). Yet, as *Abood* recognized, the very purpose of forcing employees to associate with a labor union is to facilitate its speech on their behalf, while suppressing their individual views, and thereby to achieve "labor peace." 431 U.S. at 224.

This circular logic admits no legitimate government interest, much less a compelling one.

The "labor peace" rational also pales in comparison to other government interests. The government's interest in promoting public safety—that is, domestic peace—is no doubt compelling, but only extends so far as the regulation of speech that presents a "clear and present danger." *Schenck v. United States*, 249 U.S. 47, 52 (1919). *Cf. Virginia v. Black*, 538 U.S. 343 (2003). Likewise, the federal government's interest in the "common defense" reflects its constitutional responsibility, U.S. Const. art. I, § 8, cl. 1, but does not extend to the regulation of expressive association. *United States v. Robel*, 389 U.S. 258, 265-66 (1967). And government has no compelling interest in coercing citizens' allegiance to the principles of our Constitution or their respect of the symbols of our nation. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Texas v. Johnson*, 491 U.S. 397 (1989). By comparison, government's interest in forcing workers to support and adhere to certain opinions regarding their wages, working conditions, and the like is trifling.

Finally, these errors are compounded by *Abood's* failure to recognize the distinction between government authorization of private agreements that require employees to support a labor union and the government itself forcing its employees to support a union and to channel their speech through it, to the extent that they are able. As Justice Powell observed, "[t]he State in this case has not merely au-

thorized union-shop agreements between willing parties; it has negotiated and adopted such an agreement itself." *Id.* at 253 (Powell, J., concurring). Accordingly, that "agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation." *Id.*

Indeed, the Court has subsequently recognized what recent political turmoil over state spending on public-employee benefits has made plain: "a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. For that reason, "compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Id.* Yet *Abood* allows a state to compel its employees to support a labor union's speech on these civic issues and to suppress the expression of their dissenting views, on the ground that it is convenient that workers speak with one voice. 431 U.S. at 224. But government's convenience is no basis to suppress dissent. *Riley*, 487 U.S. at 795.

"This Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 501 (2007)). *Abood's* "labor peace" rationale misapplied the Court's labor-law precedents in the service of circumventing employees' fundamental First Amendment rights to be free of coerced speech and association, to exercise the

freedom of speech, and to petition the government. Aberrant and offensive, it should be overruled.

II. Even if "Labor Peace" Could Support Compulsory Unionization, the State of Illinois Has No Compelling Interest Here

Even if the Court is unwilling to recognize at this time that "labor peace" was never a persuasive justification to countenance the violation of public workers' First Amendment rights, it should still reject the programs at issue here. The State of Illinois has no cognizable interest in maintaining "labor peace" among household workers or family members merely because they provide services to individuals who participate in a State program or because they are subject to State regulation.

"Labor peace" is not an empty semantic vessel that the State may fill up merely by asserting employer status. Instead, as described above, its contents were set at a time when Congress's Commerce Clause power was seen as less robust than today, and the "labor peace" doctrine reflects its roots, referring to the pacification of those types of industrial discord that pose a threat to interstate commerce. *Maryland v. Wirtz*, 392 U.S. 183, 191 (1968) (explaining that the National Labor Relations Act was passed to address "substandard labor conditions" that could lead to "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce"). *See also N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-43 (1937); *Ry. Emp. Dep't v. Hanson*, 351 U.S.

225, 233 (1956); *Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring).

Abood adopted this "familiar doctrine[]" as a justification for compelled speech and association in limited circumstances. 431 U.S. at 220; *id.* at 224 (explaining that a Michigan agency-shop scheme was justified by the same "evils that the exclusivity rule in the Railway Labor Act was designed to avoid"). It described that doctrine thus:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

431 U.S. at 220-21.

Ellis, following *Abood*, explained that a union could charge a non-member only for union "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis v.*

Bhd. of Ry., Airline, & Steamship Clerks, Freight Handlers, Express & Station Employees, 466 U.S. 435, 448, 455-56 (1984). *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991) (adopting *Ellis's* holding as a matter of First Amendment law). Those kinds of activities define the absolute outer limits of *Abood's* "labor peace" rationale.

But labor-management issues are necessarily absent here because Illinois does not manage the personal assistants who provide services to participants in its Rehabilitation Program and exercises no control over labor conditions. Federal law specifies the basic requirements for a Medicaid waiver program, such as Illinois's Rehabilitation Program, including that the State provide "payment for part or all of the cost of home or community-based services . . . which are provided pursuant to a written plan of care." 42 U.S.C. § 1396n(c)(1).[6] State law, in turn, lays out specific and objective requirements for personal assistants, 89 Ill. Admin. Code § 686.10, and their duties, which are limited to household tasks and contained in "service plans" approved by the customer's physician, §§ 686.20, 684.10.

Crucially, Illinois law is explicit that the homecare patient, or "customer"—not the State or any other party—"is responsible for controlling all aspects of the employment relationship between the customer

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[6] Further requirements are provided by federal regulation. *See* 42 CFR § 440.180 (requirements for home- or community-based services), § 441.301 (waiver requirements).

and the PA," from hiring to evaluation and termination. § 676.30(b). It is therefore the customer alone—and not the State—who is responsible for workplace conditions, supervision, and every aspect of the employment relationship but for one: compensation. The State has obliged itself to pay for care provided by personal assistants to Rehabilitation Program participants "at the hourly rate set by law." § 686.40. Although the collective-bargaining agreement provides for a union-administered "grievance procedure," that procedure does not apply to "any action taken by the Customer" or, for that matter, the hiring, firing, or reduction in hours of a personal assistant. CBA, art. XI.

Further, the confusion, rivalries, and dissension that may arise in a workplace absent an exclusive representative are inapplicable where, as here, there is no common or state-provided workplace at all and personal assistants carry out their duties in customers' homes. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 51 (1983) ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor-peace *within the schools*.") (emphasis added). Because the State does not manage personal assistants and takes no responsibility for their labor conditions, it lacks the power to bargain with SEIU over the terms of employment that implicate "labor peace."

Moreover, because the union is limited to the role of petitioning the State for greater pay and benefits, there can be no serious claim that its exclusive rep-

resentation of workers in this activity has freed the State from any great burden due to "conflicting demands" by personal assistants. Surely the State faces more numerous and diverse demands by Rehabilitation Program customers seeking additional benefits—a group that it has yet to attempt to organize coercively—and other recipients and would-be recipients of State benefits. Petitioners here have no greater or qualitatively different a relationship with the State than do other indirect recipients of State benefits, such as doctors serving Medicaid beneficiaries. They are, if anything, further attenuated from the State's actions than direct beneficiaries, such as the Rehabilitation Program customers whom they serve.

Federal and state labor laws reflect that the organization of household workers such as Petitioners does not further the interest of "labor peace." The National Labor Relations Act (NLRA) specifically excludes "any individual employed . . . in the domestic service of any family or person at his home" from coverage. 29 U.S.C. § 152(3). The Ninth Circuit, interpreting the NLRA shortly after its passage, described Congress's logic: "[T]here never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain." *North Whittier Heights Citrus Ass'n v. N.L.R.B.*, 109 F.2d 76, 80 (9th Cir. 1940). For similar reasons, until this past decade, states generally excluded such workers from

coverage under their collective-bargaining statutes. *See* Peggie Smith, *Organizing the Unorganizable*, 79 N.C. L. Rev. 45, 61 n.71 (2000) (listing statutes).

Nor may Illinois rely on its interest in preventing "free riders" from taking advantage of the benefits of union representation, which this Court has in every instance recognized only as subsidiary to maintaining labor peace or some other legitimate interest, and never as a standalone interest. *See, e.g., Hanson*, 351 U.S. at 233; *Street*, 367 U.S. 760-61; *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961) (Douglas, J., dissenting) (discussing *Hanson*); *Abood*, 431 U.S. at 220-21, 224; *id.* at 229 (for constitutional analysis, overriding purpose of exclusive representation is "labor stability"); *Ellis*, 466 U.S. at 448; *United Foods*, 533 U.S. at 415-16; *Knox*, 132 S. Ct. at 2290.

Indeed, this Court has expressly allowed nonmembers to "free ride" on union political expenditures that may accrue to their benefit, because such expenditures are not, themselves, justified by any interest in "labor peace." *See Street*, 367 U.S. at 770; *Abood*, 431 U.S. at 235-36; *Ellis*, 466 U.S. at 448 (nonmembers may be made to pay only for "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues"); *Lehnert*, 500 U.S. at 521; *id.* at 556-57 (Scalia, J., concurring and dissenting).

If avoiding free riders could stand alone as a justification for compelled association and subsidization

of speech, First Amendment rights would be powerless to resist government paternalism regarding speech in any instance. That is not the law. *Riley*, 487 U.S. at 790 (rejecting "the paternalistic premise that charities' speech must be regulated for their own benefit"). The Court should not expand what it has already recognized to be "something of an anomaly" under ordinary First Amendment principles. *Knox*, 132 S. Ct. at 2290.

In sum, whatever the vitality of *Abood*, it provides no support for the State of Illinois' scheme to compel workers whom it does not directly manage to fund and associate with a labor union.

CONCLUSION

Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977), was wrong when it was decided and still cannot be reconciled with the Court's cases recognizing "the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment." *Knox*, 132 S. Ct. at 2288 (citing cases). It should be overruled.

But even if the Court chooses to leave *Abood* for another day—and thereby to prolong the wholesale violation of employees' First Amendment rights that *Abood* sanctions—it should reject the coercive programs at issue here as unsupported by any compelling state interest. In either instance, the decision of the Seventh Circuit should be reversed.

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AMICUS CURIAE BRIEF

No. 11-681

In the
Supreme Court of the United States

PAMELA HARRIS, et al.,

Petitioners,

v.

PAT QUINN, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE, PACIFIC LEGAL FOUNDATION, AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

May a state, consistent with the First and Fourteenth Amendments, compel home health care providers to support financially a political organization to bargain with the state legislature over the amount of the state budget to devote to home health care programs?

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Rules

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is the public interest arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the protections for freedom of conscience enshrined in the First Amendment. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), *Doe v. Reed*, 561 U.S. 186 (2010), and *Siefert v. Alexander*, No. 10-405 (2011). The Center is vitally interested in limiting the ability of government to compel membership in and financial support of political organizations.

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To

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[1] Pursuant to this Court's Rule 37.3, all parties have filed blanket consents to amici with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995); and *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277 (2012).

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a demonstrable history of advancing the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and application of sound science in legal proceedings. It provides legal representation, without fee, to parents, scientists, educators, and other individuals, corporations and trade associations. It has litigated several "compelled speech" and "compelled association" cases as "first chair" counsel and as amicus or counsel for amici.

SUMMARY OF ARGUMENT

Liberty of conscience, protected by the First Amendment, includes the right to be free from compelled support of political activities – including the political activities of public employee labor unions. There is no distinction between "bargaining" and "lobbying." A collective bargaining agreement with public employees is an instrument of government that allocates scarce public resources.

There is no government basis, compelling or otherwise, that justifies the interference with fundamental First Amendment liberties that occurs win dissenting public employees are compelled to finance the political activities of public employee unions. These activities involve the essential political task of allocating government resources. Prior decisions granting public employee unions a privileged position – allowing them to interfere with dissenting employees First Amendment rights – has resulted significant damage to effective governance. The Court should reconsider those decisions.

ARGUMENT

I. The First Amendment Was Intended to Protect Against Compelled Political Support.

In his dissent in *Lathrop v. Donohue*, Justice Black noted: "I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." *Lathrop v. Donohue*, 367 U.S. 820, 873 (1961) (Black, J., dissenting). For the most part, this Court has come to accept Justice Black's point of view, ruling that government compelled support of ideological causes violates the First Amendment.[2] *Knox v. SEIU*

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[2] Amici here use the term "ideological" in its broadest sense. As this Court noted in *Abood v. Detroit Board of Education*, 431 U.S., at 231-32: "But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. Nothing in the First Amendment or our cases discussing its meaning makes

Local 1000, 132 S. Ct., at 2295; *United States v. United Foods, Inc.*, 533 U. S. 405, 411 (2001); *Keller v. State Bar of California*, 496 U.S., at 15-16 (1990); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943). Yet in the public employee labor union context, this Court has permitted compelled support of ideological causes – offering only limited procedural protection. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986); *Abood*, 431 U.S., at 237. As demonstrated below, Justice Black is correct that a purpose of the First Amendment was to protect against compelled support of ideological causes.

Evidence of congressional intent or ratification arguments concerning the Free Speech Clause is scarce, at best. There was clear consensus that the measure prohibited "censorship" but there was debate about the extent to which government could punish speech after it was published. That debate is revealed in the sources recounting the debates over the Sedition Act of 1798. *See* History of Congress, February, 1799 at 2988; *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting 4 Annals of Congress, p. 934 (1794)). But did the founding generation intend the First Amendment to protect against compelled speech? For that answer we must resort to the "practices and beliefs of the Founders" in general. *McIntyre v. Ohio Election Comm'n*, 514 US 334, 361 (1995) (Thomas, J., concurring).

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the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."

While there was no discussion of compelled support for political activity, there was significant debate over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. This Court has often quoted Jefferson's argument "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779) in 5 The Founders Constitution, University of Chicago Press (1987) at 77; quoted in *Keller v. State Bar*, 496 U.S., at 10; *Chicago Teachers Union v. Hudson*, 475 U.S., at 305, n.15; *Abood*, 431 U.S., at 234-35 n.31; *Everson v. Board of Education*, 330 U.S. 1, 13 (1947). Jefferson went on to note, "That even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, Religious Freedom, *supra* at 77.

James Madison was another prominent voice in the Virginia debate, and again this Court has relied on his arguments for the scope of the First Amendment protection against compelled political support: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance Against Religious Assessments in 5 The Founders Constitution at 82;

quoted in *Chicago Teachers Union*, 475 U.S., at 305, n.15; *Abood*, 431 U.S., at 234-35 n.31.[3]

Although these statements were made in the context of compelled religious assessments, this Court easily applied them to compelled political assessments in *Chicago Teachers* and *Abood*. This makes sense. Jefferson himself applied the same logic to political debate. In his first Inaugural Address, Jefferson equated "political intolerance" with the "religious intolerance" he thought was at the core of the Virginia debate. Thomas Jefferson, First Inaugural Address (1801) in 5 The Founders Constitution at 152. The theme of his address was unity after a bitterly partisan election, and goal he expressed was "representative government" — a government responsive to the force of public opinion. *Id.*; Thomas Jefferson Letter to Edward Carrington (1787) in 5 The Founders Constitution at 122 (noting, in support of freedom of the press, "[t]he basis of our government [is] the opinion of the people"). How is government to be responsive to public opinion unless individuals retain the freedom to reject politically favored groups?

Madison too noted the importance of public opinion for the liberty the Founders sought to enshrine in the Constitution. "[P]ublic opinion must be obeyed by the government," according to Madison and the process for the formation of that opinion is important.

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[3] The amount of compelled support is irrelevant to the constitutional injury. As Madison noted, even "three pence" is too much to compel. Madison, Remonstrance, *supra* at 82. Jefferson noted that freedom of conscience is violated when people are taxed to pay simple living expenses for their own pastors. Jefferson, Religious Freedom, *supra* at 77, *see also Pacific Gas & Electric Co.*, 475 U.S. at 24 (Marshall, J. concurring).

James Madison, Public Opinion (1791) in 2 The Founders Constitution at 73-74. Madison argued that free exchange of individual opinion is important to liberty and that is why he worried about the size of the nation: "[T]he more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty." *Id.* The concern was that "real opinion" would be "counterfeited." *Id.*

Madison's concern for "counterfeited" opinion was based on his fear that the voice of the individual would be lost as the nation expanded. There are other ways to lose the voice of the individual, however. Compelling the individual to support a political organization he opposes is an effective censor of individual opinion. Instead of being drowned out by many genuine voices, the individual is forced to boost the voice of those he despises. He is forced to pay for the counterfeiting of public opinion, distorting democracy and losing his freedom in one fell swoop.

This is exactly what the union, in collaboration with the state, accomplished here. The caregivers are forced to support financially a political organization they oppose — they are forced not only to acquiesce, but to support financially the creation of "counterfeit" public opinion. This is flatly incompatible with the First Amendment with its "respect for the conscience of the individual [that] honors the sanctity of thought and belief." *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

Freedom of conscience and the dignity of the individual -- these are the foundations underlying the liberty enshrined in the First Amendment. They lay at the core of Jefferson's and Madison's arguments

that have influenced the separate opinions regarding the Freedom of Speech of Justices Black (*Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J. dissenting) ("The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.")), Douglas (*Pollak*, 343 U.S. at 468-69 (Douglas, J. dissenting)), and Stone (*Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting) ("The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit")), to name but a few.

This Court recognized these principles in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). There, Justice Jackson writing for the Court observed that "Authority here is to be controlled by public opinion, not public opinion by authority." Yet reaching this conclusion was not easy for the Court. Just three years earlier the Court upheld a compulsory flag salute law in *Minersville School District v. Gobitis*. That decision prompted Justice Stone to observe that "The very essence of the liberty ... is the freedom of the individual from compulsion as to what he shall think and what he shall say." *Id.* at 604 (Stone, J. dissenting).

Since *Minersville*, Justice Stone's dissent has been vindicated. This Court has ruled that the freedom of conscience and human dignity protected by the First Amendment were violated in compelled flag salutes (*Barnette*, 319 U.S. at 641), required membership in a political party (*Elrod v. Burns*, 427 U.S. 347, 356-57 (plurality) (1976)), compelled display of state messages on license plate frames (*Wooley v. Maynard*, 430 U.S., at 713), required distribution of other organization's newsletters (*Pacific Gas & Elec-*

tric Co. v. Public Utilities Commission, 475 U.S. 1, 17-18 (1986)), and compelled contributions for political activities (*Abood*, 431 U.S. at 233-35; *Keller*, 496 U.S. at 16). The First Amendment protects public employees from government-compelled support of the political activities of the state, labor unions, and others.

II. This Court Should Reconsider the Constitutionality of Compelled Payments By Public Employees For "Bargaining"

A. The procedural protections created by this Court have proven ineffective in protecting public employees' First Amendment rights.

In a series of clear decisions, this Court has held that labor unions may not use dues or agency shop fees to support political campaigns which workers do not wish to support. *See Abood*, 431 U.S. at 235; *Beck*, 487 U.S. at 745; *Hudson*, 475 U.S. at 301-02; *Lehnert*, 500 U.S. at 522. Yet for decades, organized labor has engaged in a campaign of "massive resistance" against these decisions, consciously refusing to follow their mandates of these cases, or tailoring their responses to obstruct and frustrate the implementation of workers' rights. *See generally* Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. Pa. J. Bus. & Emp. L. 663 (2008); Jeff Canfield, *What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck*

and similar cases). *See also Monson Trucking Inc.[v.] Anderson*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Local 74, Serv. Employees Int'l Union [v.] Orce*, 323 N.L.R.B. 289, 290 (1997) (same); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, Case No. 8-CB-9415-1, 2004 NLRB LEXIS 57, *14 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights.").

As one expert testified to Congress,

> [t]he first hurdle that employees face [when asserting their rights not to subsidize union political activities] is that they are lied to by union leaders who purport to represent them. I use a stark term, and I mean it. That's right. They are lied to regularly, clearly as a matter of course.

Hearings Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, on H.R. 3580, The Worker Right to Know Act, Serial No. 104-66 (104th Cong. 2d Sess. 1996) at 111 (Statement of W. James Young).

Even the National Labor Relations Board has been criticized for participating in the unions' campaign of resistance toward worker rights established in *Beck*, *Abood*, and *Hudson*. *Cf. NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999) ("[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing."). The NLRB has adopted delay tactics so

extreme that some cases asserting workers' rights under *Beck*, *Hudson*, and *Abood* have waited nearly a decade for resolution. *See, e.g.*, *Am. Fed'n of Television & Recording Artists*, 327 N.L.R.B. 474, 476 (1999) (challenging 1989 expenditures). Only in 1995 did the NLRB first apply the 1988 *Beck* decision, in *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 224 (1995), a case in which the NLRB determined that when workers demand an audit detailing how much of their money is spent on political campaigning, they are entitled only to the union's in-house audit, and not an independent audit. The District of Columbia Circuit later called this ruling inconsistent with "any rational interpretation" of "*Hudson*'s 'basic considerations of fairness' language." *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997).

Given the politically weak positions of dissenting workers, the pervasive abuses of unions, the lack of protection in administrative agencies, and the fundamental importance of the expressive and associative rights at issue, protecting the individual's freedom to choose—and to dissent—in the environment of the unionized workplace must be the guiding principle in this case. *See also* Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 Wayne L. Rev. 705, 717 (2003) (The "proper mooring" of "the union dues dispute" is "freedom of conscience.").

B. Public sector "bargaining" is indistinguishable other lobbying activity.

Contracts between private employers and unions representing private sector employees are private decisions generally disciplined by market forces.

Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Lab. & Emp. L. 441 (2003). Errors in analysis by the employer can lead to the employer going out of business. That result is tempered, however, by the fact that competitors in the private sector can continue to provide the goods or services or new firms can rise to fill the gaps.

Public sector contracts are quite different. As Summers notes, those contracts are not private decisions. Instead, the contract itself is an instrument of government. *Id.* 442. The decision to spend more money on home health care workers means either higher taxes or a decision to spend less money on other public services. Here the employee has two roles that may well be in conflict. As employee, the worker may enjoy the benefit of higher wages, shorter hours, or license restrictions that prevent other workers from competing for his or her position. As a citizen and taxpayer, however, the employee's interests are quite different. The citizen may worry about whether the restrictions limiting competition for his or her job will have an impact on public health or leave some disabled people without the care they need. He or she may also worry about the services that must be cut in order to finance higher wages for his or her job. To cover the costs of increased payments to personal care assistants will the state cut back on healthcare, parks, roads, bridge maintenance, or assistance to the poor?

The District of Columbia Circuit noted this problem in *Miller v. Airline Pilots Association*, 108 F.3d 1415 (D.C. Cir. 1997). The precise issue was whether the union could compel dissenters to contribute toward the cost of lobbying on safety related issues. *Id.*, at 1422. The court explained that while all pilots

may be interested in the airline safety, they will not all agree on the cost of that safety: "The benefits of any regulation include trade-offs." *Id.* That issue of trade-offs is present in every lobbying campaign by public employee unions. Teachers may want higher pay, but are they willing to accept the trade-off of larger class sizes? Will they be willing to subject their own children to those larger class sizes? How is it that only one side of this debate, the public employee union's position, is privileged by the ability to coerce payments from dissenters to support the lobbying?

This Court recognized the difficulty of distinguishing between lobbying and bargaining in *Lehnert v. Ferris Faculty Association*. The plurality opinion agreed that dissenting employees can be compelled to finance lobbying the government to win ratification of a negotiated agreement. *Id.*, 519-20. The Court then tried to draw a line between this type of lobbying and other lobbying that might advance the interests of employees more generally, finding that dissenting employees could not be compelled to pay for the latter. *Id.*, at 520. As demonstrated in *Knox*, however, the unions have ignored such line-drawing. There is, however, no meaningful difference between the two types of legislative measures in terms of their effect on employees as employees and employees as citizen/taxpayers. *See* Rafael Gely, et al., *Educating the United States Supreme Court at Summers' School: A Lesson on the "Special Character of the Animal"*, 14 Employee Rts. & Emp. Pol'y J. 93 (2010).

Simply put, state and local governments are different from private firms. That difference is critical. We do not rely on government as merely one partici-

pant in the market that produces widgets. Courts have long understood that government is fundamentally different from the private sector. *See Unified School District v. Wisconsin Public Employment Relations Commission*, 81 Wis.2d 89, 259 N.W.2d 724, 730 (1977); *State v. Florida Police Benev. Ass'n, Inc.*, 613 So.2d 415, 417 (Fla. 1992). We give our government the power to compel payments in the form of taxes so that it can deliver public services. These public services range from police and fire protection to licensing of drivers to road maintenance to care for the poor. How much in taxes government will compel and what balance of services it will deliver with those tax receipts are all decisions that we leave to the political process. *See Gibraltar School Dist. v. Gibraltar MESPA-Transportation*, 505 N.W.2d 214, 223 (Mich. 1993). The Constitution protects the right of citizens to band together to participate in this process or petition government as individuals. They may not, however, coerce others to finance their political activities.

Public sector bargaining is a political process that concerns the allocation of scarce government resources. *See* Summers at 443. There is no meaningful distinction between an employee group lobbying for a salary increase, a business lobbying for loan or tax credit, or a taxpayer association lobbying for lower tax rates. All of these groups seek to influence government to accept their policy preference and advance their particular financial goals. There is no basis for granting one group the power to compel financial support from citizens who oppose those policy goals. Indeed, this Court recognized that the business' shareholders who dissent from the lobbying program are free to withdraw their investment from

the firm – neither the corporation nor the state may compel them to support the business' lobbying program. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

1. Public sector bargaining is especially pernicious because of the limited short-term focus of the goals of bargaining.

Although this Court first suggested that public employees in "bargaining units" are no different than employees in the private sector compelled into a bargaining unit, the actual judgment of the Court was that the dissenting employees had stated a cause of action under the First Amendment. *Abood*, 431 U.S., at 241-42. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment. He questioned, however, the Court's suggestion that public employees could be compelled to pay a fee for "bargaining" with the public entity employer. Instead, he argued that the Court ought to simply apply the same analysis it used in the patronage cases. *Id.*, at 260 n.14 (Powell, J., concurring in the judgment).

Justice Powell's analogy of compelled payments to a public employee labor union to political patronage systems is not entirely apt. In dissenting from the Court's ruling in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), Justice Scalia noted arguments that patronage may be necessary to the survival of political parties "as the forges upon which ... the essential compromises of American political life are hammered out." *Id.*, at106 (Scalia, J. dissenting).

While it can be argued that political parties share a goal of governance for the public good – even while disagreeing on what constitutes the public good – the same cannot be said of public employee labor unions. These unions cannot be concerned with the "public good." The union's interest is always the interests of public employees in working fewer hours for more pay and with protection from dismissal. This is a short-term, narrow focus that can easily be seen to come into tension with the employees' interests as citizen and taxpayer.

Two examples in California highlight the limited focus of public employee unions compared to the broader interests of the employees as citizens and taxpayers. Recently, the California Teachers Association successfully opposed a bill that would allow school districts to take prompt action against teachers accused of sexually molesting children. The legislation, Senate Bill 1530, would have allowed school districts to send out the notice of dismissal over the summer thus allowing the dismissal proceedings to begin before the start of the Fall semester. *Compare* http://acalanesteachers.org/News.html *with* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1530&search_keywords=] (last visited Nov. 25, 2013).

Another example, also concerning the California Teachers Association, highlights one reason for California's long-term budget crisis. The union sponsored, campaigned for, and won passage of a ballot initiative compelling the state legislature to devote 40 percent of all state revenues to public schools. Steven Malanga, *The Beholden State*, City Journal, vol. 20, no. 2 (2010) (http://city-journal.org/2010/20_2_california-unions.html last visited Nov. 25, 2013).

Teachers as employees clearly benefitted because the funding formula added $450 million to the budgets of local school districts, most of which went to teacher salaries and benefits. *Id.* Teachers as citizen/taxpayers, however, may have a different point of view on a constitutional provision that ties the hands of the state legislature in allocating limited revenues among all of the competing public services the state provides.

In this way public employee collective bargaining affirmatively interferes with effective governance. *See* Justin, Duclos, *The Etiology of a Malfunction in Democratic Processes*, 45 Ariz. St. L. J. 53, 78 (2013). Because of the political power of this special interest group, cities and school districts are increasingly in danger of bankruptcy. *See* Leo Troy, *Are Municipal Collective Bargaining and Municipal Governance Compatible?*, 5 U. Pa. J. Lab. & Emp. L. 453 (2003). Several cities have filed for bankruptcy protection in recent years, Detroit being the most recent example. Joseph Lichterman, *Judge to Rule on Detroit Bankruptcy Petition on December 3*, Reuters, http://www.reuters.com/article/2013/11/25/us-usa-detroit-bankruptcy-idUSBRE9AO0ZZ20131125 (last visited Nov. 25, 2013). This case, however, does not involve the question of whether public employee collective bargaining is a wise public policy. Instead, this Court must decide if the citizen who also happens to be an employee must continue to finance the political lobbying for the measures that cause the bankruptcy.

2. Public entities are also in danger of capture by public sector unions in pursuit of their limited, short-term goals.

This Court has recognized the inherently *political* nature of public sector collective bargaining. Lehnert, 500 U.S., at 519. The Court has not, however, given much thought to the impact on government structure of allowing these unions to coerce payments from dissenting employees. Public employee unions have already established themselves as a major political force. *See* Joe Guillen, "Issue 2 Campaigns Raised More than $50 Million," Cleveland Plain Dealer, December 17, 2011;[4] Molly Bloom and Ida Lieszkovszky, "Educations Unions Raise Much of $19 Million to Defeat Ohio's Issue 2," State Impact, NPR, October 27, 2011.[5] This includes political spending on state judicial elections. Brennan Center for Justice, New York University School of Law, "Special Interest TV Spending in Wisconsin Supreme Court Race Tops $3 Million," April 4, 2011;[6] Shushannah Walshe, "30 Million Pouring in to Influence Wisconsin's Recall Elections," ABC News, August 4, 2011.[7]

Public employee unions are not limited to lobbying public agencies and legislative bodies. They can also seek to take over those agencies. Given the narrow focus of these unions and the potential impact on

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[4] http://www.cleveland.com/open/index.ssf/2011/12/issue_2_campaigns_raised_more.html (last visited Nov. 25, 2013)

[5] http://stateimpact.npr.org/ohio/2011/10/27/education-unions-push-campaignspending- on-ohios-issue-2-sky-high (last visited Nov. 25, 2013).

[6] http://www.brennancenter.org/content/resource/special_interest_tv_spending_in_wisconsin_supreme_court_tops_3_million (last visited Nov. 25, 2013).

[7] http://abcnews.go.com /Politics/30-million-pouring-influence-wisconsin-recall-elections/story?id=14235471 (last visited Nov. 25, 2013).

general public policy, the dissenting employee as citizen and taxpayer has special reason to be concerned.

Member dues (both voluntary and coerced) allow public employee unions to amass significant resources to be employed in political campaigns. John O. McGinnis & Max Schanzenbach, *The Case Against Public Sector Unions*, 162 Hoover Inst. Pol'y Rev. (Aug. 1, 2010).[8] Politicians, eager to maintain their position, will naturally tend to favor concentrated groups with such resources. *Id.* The political power wielded by unions make government authorities more likely to favor the union demands more heavily in balancing taxpayer needs against employee wishes. *See* Matthew Dimick, *Compensation, Employment Security, and the Economics of Public-Sector Labor Law*, 43 U. Tol. L. Rev. 533, 546-47 (2012); Terry M. Moe, *Political Control and the Power of the Agent*, 22 J.L. Econ. & Org. 1, 4-5 (2006); Troy, *supra*; Terry M. Moe, *The Union Label and the Ballot Box*, Educ. Next, Summer 2006, at 59.

Public employee unions do not simply dominate on financial issues, however. Their campaign war chests also allow them considerable voice on policy. Caroline Minter Hoxby, "How Teachers' Unions Affect Education Production," Quarterly Journal of Economics 111, no. 3 (August 1996). California is a case in point.

A study by the California Fair Political Practices Commission showed that in 10-year period between 2000 and 2009 the California Teachers Association was the top spending political organization in the state by a wide margin. Big Money Talks, Califor-

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[8] http:// www.hoover.org/publications/policy-review/article /43266 (last visited Nov. 25, 2013).

nia's Billion Dollar Club, Calif. Fair Political Practices Comm'n, (March, 2010) at 10.[9] During that period, the powerful public teachers union spent more than $200 million on political campaigns, ballot initiatives, and lobbying. *Id.* at 11. The number two ranked political organization was also a public employee union, the California State Council of Service Employees which spent more than $107 million in this same period. *Id.* at 10. By contrast, the California Chamber of Commerce spent only one-fifth as much on political activities as the teachers union. *Id.*

As noted earlier, the California Teachers Association successfully sponsored a ballot initiative to amend the California Constitution to guaranty 40 percent of the state budget every year to public education. That measure put an additional $450 million per year in the hands of local school districts. Those districts, however, are not managed by independent boards representing parents and citizens. The teachers union has invested its political funds in local school board elections. Those local school boards are now "close allies" of the teachers union. Malanga, *supra*.

This tremendous political power of the public employee unions is made possible in part by rulings of this Court that allow the unions to compel dissenters (as a condition of continued public employment) to contribute financial support to the union's political activities.

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[9] Available at http://www.fppc.ca.gov/reports/Report38104.pdf (last visited Nov. 25, 2013).

C. The Court should overrule *Abood* as a failed experiment based on a faulty premise.

In his dissent in *Rutan*, Justice Scalia quoted the colorful logic of Geoge Washington Plunkitt of Tammany Hall fame:

> "First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay."

Rutan, 497 U.S., at 93 (Scalia, J. dissenting). Whatever one may believe about the merits of Plunkitt's argument for party patronage, the same logic cannot be applied to public employee unions. The nation survived quite well for two centuries served by able men and women as public employees without representation by a public employee union.

This Court in *Abood* accepted, without analysis, the argument that the same interest in labor peace that supported compelled union shop fees in the private sector applied equally to the public sector. *Abood*, 431 U.S., at 224. There was no basis for this claim, however. There was no showing of a history of labor violence that could be settled with collective bargaining and exclusive representation. Even more than the lack of a factual justification for the claimed state interest, there is no basis for distinguishing between "bargaining" and ordinary political activity.

One premise underlying *Abood* and its progeny is that there are actions by public employers that are strictly "employer" actions, separate and apart from

"public agency" actions. *Lehnert*, 500 U.S., at 520. That ill-defined line was fully destroyed, however, when the Court ruled that a public employee union could compel public employees to finance efforts to win legislative approval of the bargaining contract. *Id.* Yet, as we have seen, those activities are fundamentally governmental in nature and affect the entire range of decisions legislatures and executives must weigh in deciding how to allocate scarce public resources.

CONCLUSION

There is simply no basis for distinguishing between a union lobbying for increased wages for public employees, a business lobbying for a tax credit, or a taxpayer organization lobbying for a tax decrease. Allowing a labor union to use the power of the state to compel dissenting employees to pay for the union's political activities advances public employment labor peace no more than allowing the business or the taxpayer association to compel dissenters to contribute toward their political activities. This Court should overrule its decision in *Abood* and reverse the decision below.

DATED: November, 2013.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

PAMELA HARRIS, ET AL.,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF ALBERT CONTRERAS, PATRICIA GRIGGS, AND JONATHAN KISS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are private citizens who offer care services in home or home-like settings. Two are from Ohio; the third lives in Oregon. Like Petitioners in this case, all three work in states that have taken steps to compel them to accept and fund exclusive union representatives to bargain with the government. They welcome the opportunity to express their views in this case, and they urge the Court to uphold their right to associate—and the concomitant right to *not* associate—with the groups of their choosing.

Amicus Albert Contreras owns and operates Chelsea AFH LLC, a foster home for developmentally disabled adults in McMinnville, Oregon. His business is licensed by the state and offers residential care and services in a home-like environment to disabled adults. In 2007, the State of Oregon designated itself "the public employer of record" for citizens like Mr. Contreras, but only "[f]or purposes of collective bargaining . . . ." S.B. 858 74th Leg. Assemb., Reg. Sess. (Or. 2007) (codified as amended at Or. Rev. Stat. § 443.733). Since then, the union and the state have negotiated a rate structure that sharply cuts the Medicaid funds available to Mr. Contreras's client—even though he still provides the same level of services. Requiring him to support this union activity would thus give rise to First Amendment injuries that are more than academic.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amici curiae* or their counsel made a monetary contribution that was intended to fund preparing or submitting this brief. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

Amicus Jonathan Kiss has been a licensed practical nurse in Ohio since 2004. An independent provider, he locates patients on his own initiative, hires and pays a registered nurse supervisor for his practice, submits to an annual criminal-background check at his own expense, and covers all forms, equipment, and compliance costs associated with his business. He is responsible for filing and paying his own taxes, and he is not eligible for state-employee benefits like retirement coverage, state healthcare plans, overtime, paid holidays, or sick days. In 2007, independent providers in Ohio were exposed to forced unionization, *see* Ohio Exec. Order 2007-23S (July 17, 2007), and Mr. Kiss ultimately began seeing union dues deducted from his income.[2] When Mr. Kiss inquired about paying only "fair share" dues, he was informed that the reduced payments would still total around 90% of full-membership dues. Mr. Kiss also understood that he would need to complete a lengthy, intrusive questionnaire before opting for fair-share payments. Faced with disclosing personal information or paying full dues, Mr. Kiss paid the full dues.

Amica Patricia Griggs—a registered nurse—is also an independent provider in Ohio. She pays her own taxes and works for an individual patient, not the state. Like Mr. Kiss, Ms. Griggs did not choose to associate with a labor organization. Indeed, like the example in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), she is opposed to unionism itself. *Id.* at 222. Yet she was "forced to support financially an organization with whose principles and

2. Although this agency-shop arrangement is no longer in force in Ohio, *see* Br. of Pet'rs 50 n.17, the mere fact that it was illustrates the continuing threat to associational rights in that state.

demands" she disagrees. *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012).

SUMMARY OF ARGUMENT

Petitioners argue that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled. *See* Br. for Pet'rs 18-24. *Abood* is certainly on weak footing, as the Court's recent criticism of its constitutional reasoning "cast[s] serious doubt" on its continued vitality. *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2299 (2012) (Sotomayor, J., concurring in the judgment). Indeed, *Knox* questioned the entire concept of forced unionization and fee exaction, *see id.* at 2291 (majority opinion), challenged *Abood*'s endorsement of the compelling interest in public employers' maintaining "labor peace," and doubted the derivative interest in curtailing "free riding," *id.* at 2290. *Abood*'s days thus may be numbered.

Though the court of appeals relied on *Abood* in ruling in Respondents' favor, this Court need not overrule *Abood* to reverse the decision below. This is because the ruling of the court of appeals extends *Abood* well beyond the bounds of its own reasoning. The State of Illinois may be the payor of the homecare services provided by Petitioners, but the private-beneficiary customer, as a matter of law, is the provider's "employer." The State thus is in no meaningful sense the employer of the Medicaid homecare providers it is forcing to associate with Respondent SEIU. *See* 20 Ill. Comp. Stat. 2405/3(f) (designating personal assistants "public employees . . . [s]olely for the purposes of coverage under the Illinois Public Labor Relations Act"). Accordingly, the State is not "management," Br. for Pet'rs 44-45, and cannot properly invoke the interests—compelling or not—endorsed by *Abood*.

Nor should *Abood* be extended to immunize the State's intrusion on the rights of homecare providers to freely associate—especially given that the Court has characterized the agency-shop system as an "anomaly" and an "extraordinary" exception to First Amendment free-association principles. *Knox*, 132 S. Ct. at 2290, 2291. The rationales underlying *Abood* simply do not fit where the State is acting as an administrator and sovereign rather than an employer. Indeed, in light of the exacting scrutiny required under this Court's precedent, *id.* at 2289, extending *Abood* to apply here would perhaps require a more significant step than simply overruling that decision.

Moreover, despite the court of appeals' attempt to cabin its ruling, extending *Abood* to apply here would invite abuse. The rationale is boundless, especially given that "[t]he administrative state wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (citation and quotations omitted). It requires only a tangential connection between the State and private actors who could then be forced by law to accept a designated union representative over their objections. Indeed, huge swaths of private actors across a spectrum of occupations and programs—court-appointed attorneys, subsidized childcare providers, government contractors, Social Security recipients, and foster parents to name just a few—could be forced to surrender their First Amendment associational rights were the Court to affirm the decision below. These are no mere hypotheticals. Illinois has authorized mandatory representation of subsidized childcare providers, and Oregon has introduced a bill to designate foster parents as "public employees" for

the purposes of collective bargaining. The court of appeals' promise of the "narrowness" of its ruling is thus empty. The sheer breadth of its reasoning shows why this is not the "exceedingly rare" case in which the State can meet "exacting scrutiny." *Knox*, 132 S. Ct. at 2289.

ARGUMENT

I. Coercing Nonmembers to Fund Unions Is an "Extraordinary" Exercise of State Power that Warrants Exacting Scrutiny.

A. State-Mandated Agency Shops Burden Core First Amendment Rights.

As a matter of first principles, "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2288 (2012). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted). And a corollary to this freedom to associate is "a freedom *not* to associate." *Knox*, 132 S. Ct. at 2288 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)) (emphasis added).

"Closely related to compelled speech and compelled association is compelled funding of the speech of other private speakers or groups." *Id.* Individual rights "are at serious risk if the government can compel a particular

citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). Such is the case with regard to state-mandated agency shops, which "force individuals to contribute money to unions as a condition of government employment," *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007), or in order to receive government funding. State-mandated agency shops like Illinois's therefore "present[] First Amendment 'questions of the utmost gravity.'" *Knox*, 132 S. Ct. at 2284 (citation omitted).

The resulting First Amendment burdens are profound. A nonmember employee "may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223 (1977). So when "a State establishes an 'agency shop' that exacts compulsory union fees'" as a condition of public employment or participation in a government program, "'[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree.'" *Knox*, 132 S. Ct. at 2282 (quoting *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 455 (1984)). To echo an example identified in *Abood*, some employees "might object to the union's wage policy because it violates guidelines designed to limit inflation . . . ." 431 U.S. at 222. Others might simply object to unionism itself. *Id.*; *cf. id.* at 231 ("Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs.").

Moreover, although this Court has denied that there is a "critical constitutional" difference between public agency shops and state-backed private ones, *id.* at 232, there is no denying that public-union activity has a political dimension. "[D]ecisionmaking by a public employer is above all a political process." *Id.* at 228. Public-sector unions necessarily "tak[e] many positions during collective bargaining that have powerful political and civic consequences . . . ." *Knox*, 132 S. Ct. at 2289. Nonmembers' ideological objections to public-sector unions may thus be particularly acute. This is especially true in a case like this one, where the individuals forced to accept a designated union as their bargaining representative are employed by individuals or private entities—not the State. Because the State is in no meaningful sense the employer of the dissenting employees, *see* 20 Ill. Comp. Stat. 2405/3(f), the state-mandated union activity is *entirely* political.

Employees may oppose unions for more tangible reasons too. Take a nonmember who is part of a minority group within the union membership—for example, a part-time employee or an elderly worker. *See* Sheldon Leader, Freedom of Association 176 (1992). These workers may have interests that conflict with those of the union's majority, leading to circumstances where "some . . . may well find themselves worse off with [a designated] union than with no union at all." *Id.*; *see, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 253 (2009) ("After the initial arbitration hearing, the Union withdrew the first set of respondents' grievances—the age-discrimination claims—from arbitration. Because it had consented to the contract for new security personnel . . . the Union believed that it could not legitimately object to respondents' reassignments as discriminatory.").

"There is . . . no real solution to such a problem to be found in a union's general duty of fair representation." Leader, *supra*, at 177-78. "'In establishing a regime of majority rule,' the labor-relations framework seeks to secure "to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.'" *Penn Plaza*, 556 U.S. at 270-71 (quoting *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975)). In these instances, then, coercive agency-shop arrangements force nonmembers to associate with and fund activity that affirmatively harms them. *See Knox*, 132 S. Ct. at 2289.

Lastly, coerced union funding presents other, more mundane burdens too. Even though nonmembers can be compelled to defray only certain union costs, *see infra* 11-12, separating chargeable from nonchargeable fees is a thorny problem, *Knox*, 132 S. Ct. at 2295. Because auditors accept the unions' characterization of expenses without question, labor organizations can easily "take[] a very broad view of what is chargeable" and put the onus on dissenting employees to challenge these determinations. *Id.* at 2294; *see also id.* at 2294 n.8 (remarking on "the painful burden of initiating and participating in such disputes"); Leader, *supra*, at 177 (noting, in a related context, "the lengthy and possibly expensive course of litigation"). With good reason, therefore, the Court considers agency shops an "unusual" and "extraordinary" construct. *See Knox*, 132 S. Ct. at 2291; *Davenport*, 551 U.S. at 184.

B. Coerced Union Funding Must Be Carefully Tailored to Serve the State's Interest in "Industrial Peace."

Because "the agency shop itself impinges on nonunion employees' First Amendment interests," *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 309 (1986), coerced union funding faces exacting scrutiny, *Knox*, 132 S. Ct. at 2289; *see also id.* ("[T]he compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'") (quoting *Ellis*, 466 U.S. at 455). Under the exacting-scrutiny standard, agency-shop systems "are permissible only when they serve a compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (citations and quotation marks omitted); *see also id.* at 2291. This sets a high bar. Indeed, though this Court most recently termed it "exacting scrutiny," the standard approximates the traditional strict-scrutiny formulation used for other direct burdens on First Amendment rights. *Cf. Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

The Court has identified only two state interests sufficiently compelling to justify mandatory union fees—"industrial peace" and the derivative interest in avoiding free riders. *Abood*, 431 U.S. at 224; *Ellis*, 466 U.S. at 455-56. Also called "labor peace," the term "industrial peace" is shorthand for the government's interest in stabilizing labor-management relations on core issues like "wages, hours, and working conditions." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). In the workplace, it is argued, individual workers "have little, if any, bargaining power" compared to the management representatives

who oversee their employment. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 735 (1981). Collective bargaining thus serves to "defus[e] and channel[] conflict between labor and management." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 548 (1984). It furthers industrial peace, the Court has held, by facilitating the "amicable settlement of disputes" in the workplace. *Ry. Employes' Dep't v. Hanson*, 351 U.S. 225, 233 (1956).

In turn, granting unions exclusive bargaining power "prevents inter-union rivalries from creating dissension within the work force . . . and frees the employer from the possibility of . . . conflicting demands from different unions." *Abood*, 431 U.S. at 221; *see also id.* at 224 (noting "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement"). Hence, in the name of industrial peace, unions are given supervening authority over a set of issues unique to the labor-management relationship: "negotiating and administering a collective-bargaining contract and . . . settling grievances and disputes." *Ellis*, 466 U.S. at 448; *Abood*, 431 U.S. at 222.

The interest directly justifying coerced nonmember payments—the so-called "free-rider" interest—follows from the interest in industrial peace. *See Knox*, 132 S. Ct. at 2290 (noting that the free-rider theory is "justified by the interest in furthering 'labor peace'"). Because unions are empowered to represent all members of their bargaining unit—union and non-union alike—the Court has held that coerced-funding arrangements aid industrial peace by taking account of free riders. *Air Line Pilots*

Ass'n v. Miller, 523 U.S. 866, 872-73 (1998). By compelling payments from all represented employees, the agency shop "counteracts the incentive that employees might otherwise have to . . . refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Abood*, 431 U.S. at 226. Like the industrial-peace interest, this tag-along, "anomalous" interest in eradicating free riders is a narrow one. States can "ma[ke] inroads" on employees' associational freedoms "for the limited purpose of eliminating the problems created by the 'free rider,'" but only in the labor-management sphere. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 767 (1961); *see also Ellis*, 466 U.S. at 452 ("[T]he free-rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members.").

The mere assertion of these interests does not suffice to justify compelled funding, however. In each case, state-mandated unions must demonstrate that every aspect of compelled funding is "justified by the governmental interests behind the union shop itself." *Ellis*, 466 U.S. at 456; *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 518-19 (1991). Coerced funding must be "germane" to collective-bargaining activity. Nonmembers can be compelled to support only union pursuits that further the justifying state interests—that is, "the negotiation or administration of collective agreements," the "adjustment of grievances and disputes," and closely related activities. *See Street*, 367 U.S. at 768; *cf. Lehnert*, 500 U.S. at 552 (Scalia, J., concurring in the judgment in part and dissenting in part) ("In past decisions . . . , we have focused narrowly upon the union's role as an exclusive bargaining agent.").

When agency-shop measures do not serve "the governmental interests underlying [judicial] acceptance of union-security arrangements," *Lehnert*, 500 U.S. at 520, this Court has not hesitated to invalidate them, *see, e.g.*, *Street*, 367 U.S. 768 (disallowing compelled funding for political contributions); *Lehnert*, 500 U.S. at 527 (plurality op.), 559 (Scalia, J., concurring in the judgment in part and dissenting in part) (lobbying activities unrelated to collective bargaining); *id.* at 528-29 (plurality op.), 559 (Scalia, J., concurring in the judgment in part and dissenting in part) (public-relations campaigns). Unions may not exact fees—even temporarily—that are not tied to the state interests justifying agency shops. *Hudson*, 475 U.S. at 305. Indeed, the Court's solicitude for nonmember rights is so high that unions must follow *Hudson*'s strict notice regime before collecting any nonmember fees, *id.* at 309, as well as affirmative "opt-in" measures for certain assessments, *Knox*, 132 S. Ct. at 2296. In short—and in keeping with the heightened scrutiny the Court demands—"any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech." *Id.* at 2291.

II. The Illinois Agency-Shop Scheme Fails Exacting Scrutiny Because the State Interests Justifying Forced Association Have No Purchase Here.

The Seventh Circuit's analysis in this case bore little resemblance to exacting scrutiny. Borrowing from an assortment of statutory sources, the court concluded that Illinois exercised "significant control" over the Home Services Program (Rehabilitation Program). *Harris v. Quinn*, 656 F.3d 692, 697-98 (7th Cir. 2011). As a result, the court continued, the State could plausibly be viewed

as a "joint employer" of personal assistants. The case was thus "controlled by *Abood*," and objecting personal assistants could be bound to the full range of agency-shop obligations. *Id.* Even though Petitioners challenged the State to show how forced unionization served any compelling interest, the court gave short shrift to the case's constitutional dimensions. The state interest in industrial peace raises "numerous and complex" issues, the court reasoned, *id.* at 699 (quoting *Hanson*, 351 U.S. at 234), rendering it "a question of policy outside of the judiciary's concern," *id.*

By treating Illinois's decision to coerce support for unions as a barely reviewable policy judgment, the court of appeals failed to account for the First Amendment interests at stake. Under exacting scrutiny—the correct standard—the State's justifications for compelled union fees do not withstand inspection. By regulation, Illinois has vested individual customers with full management authority over their personal assistants; the State's role is simply "ensuring that the funds . . . are administered in accordance with all applicable laws." Ill. Admin. Code tit. 89, § 676.10. By its own design, therefore, the State of Illinois acts as an administrator, not an employer. And because the State is acting in this traditional sovereign capacity, forced unionization serves no compelling interest recognized by this Court. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (viewing the government's general interest "in achieving its goals as effectively and efficiently as possible" as "a relatively subordinate interest"). To the contrary, the labor-management issues the State cites to justify collective bargaining are exclusively the responsibility of private customers, not government actors.

A. The Medicaid Programs Vest Management Authority in the Customers, Not the State.

Under Illinois's Rehabilitation Program, each private beneficiary—or "customer"—exercises near-plenary control over his or her personal assistant (PA). By law, a customer's duties under the program include "the obligation to serve as the employer of the PA." Ill. Admin. Code tit. 89, § 676.30(a). The customer "control[s] all aspects of the employment relationship with the PA," *id.* § 676.30(b), "including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing (where, in the opinion of the customer, it is appropriate or necessary) disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." *Id.* § 676.30(a); *see also id.* § 677.200.

These contractual terms are formalized in an employment agreement between customer and PA in order "to confirm their understanding of the nature of the employment relationship involved and the extent of control that the customer retains over the services performed by the personal assistant." *Id.* § 676.130(c); *see also id.* § 676.30(q) (customer is "responsible for designating the backup personal assistant"). Customers may also require any candidate to submit to a criminal-background check, with "no obligation to share the results of the investigation with [the State]." *Id.* § 686.25. In short, the private customer is decidedly "management."[3]

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3. Participants in the Home-Based Support Services Program enjoy similar autonomy in their hiring and oversight of personal-

The State has a role as well—not surprising for a government-funded program. But the State's involvement is circumscribed. The Department of Human Services (DHS) is "responsible for ensuring that the funds . . . are administered in accordance with all applicable laws." At the same time, though, the agency has no "control or input in the employment relationship between the customer and the personal assistants." *Id.* § 676.10(c). DHS counselors—the primary points of contact for customers—act as guardians of the public fisc, not overseers. By definition, counselors "help[] to ensure that the funds available . . . are properly distributed . . . ." *Id.* § 676.30(c). In defining the scope of services to be funded, they deal with the private customer, establishing a "service plan" based on the customer's needs and ensuring that the monthly expenses are within a range calculated by regulatory formula. *Id.* §§ 684.70(a), 679.50. Once the plan is established, the customer has "complete discretion" to hire any person who meets the regulation's requirements. *Id.* §§ 684.20(b), 686.10. DHS has no power to influence this employment decision—beyond confirming that the threshold regulatory conditions are met—or to ensure the quality of a personal assistant's performance.

Nor does the State's role as wage payor have the significance ascribed to it by the Seventh Circuit. True enough, the State pays Medicaid funds "directly to . . . personal assistant[s]." *Harris*, 656 F.3d at 698. But this

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care providers. As expressed in the regulation, "[t]he type, intensity and source of support services shall vary according to the individual's needs, other supports available and personal preferences, shall promote community integration, independence and self-sufficiency, and shall change as the individual's needs and preferences change." Ill. Admin. Code tit. 59, § 117.115(f).

does not signify a labor-management relationship; it is an administrative measure called for by federal law. "Because [federal] regulations . . . prohibit re-assignment of provider claims, no payment [can] be made directly to any customer . . . ." Ill. Admin. Code tit. 89, § 676.200; *see also* 42 C.F.R. § 447.10(d). Thus, Illinois regulations make clear that these payments are "on behalf of" the private customers. Ill. Admin. Code tit. 89, §§ 676.200, 676.130.

Similarly, the State is hardly in a position to "effectively" fire a personal assistant by withholding funding, contrary to the court of appeals' conclusion. *Harris*, 656 F.3d at 698. To be sure, a customer is not entitled to funding for a person who does not meet the regulatory conditions for personal assistants (for example, "hav[ing] a Social Security number"). Ill. Admin. Code tit. 89, § 686.10(a). But for those who qualify under these threshold provisions, the State has no power to second-guess the customer's employment decision. Even the counselor's role in annual PA reviews—another point the court of appeals noted—is purely advisory. *See id.* §§ 686.30(a) (requiring the customer to complete the evaluation "with assistance of the counselor"), 686.30(c) (providing that the counselor shall "mediate" the outcome of the evaluation). At base, DHS is a program administrator, ensuring that government funds aid Illinois residents "in accordance with all applicable laws." *Id.* § 676.10(c). This role exemplifies the State as sovereign, not supervisor. *See Engquist*, 553 U.S. at 598.

B. Forcibly Unionizing Personal Assistants Does Not Serve a Compelling State Interest.

Since the interactions between PAs and the State have so little in common with labor-management dealings, the interests justifying coerced union funding are not an easy fit. In the executive orders authorizing personal-assistant and provider unionization, the State cited its need for "feedback," Pet'rs App. 46a, 49a—an interest it has since recast as a need to combat "high turnover, low morale, excessive absenteeism, poor training, lack of productivity, or any combination thereof . . . ." Illinois Br. in Opp. 17; *see also* Br. of U.S. as Amicus Curiae 21. Given the complexity of the "ingredients of industrial peace," the State maintains that these "legitimate interest[s]" are insulated from judicial review. *See* Illinois Br. in Opp. 17. The Seventh Circuit agreed.

This is not exacting scrutiny. The reference to "reasonable" legislative judgments suggests something closer to rational basis. *Id.* at 17-18. And the State's justifications do not withstand inspection under any heightened review. Whatever their legitimacy, the State's declared interests do not sound in "industrial peace." Misappropriating the industrial-peace interest is nothing new. For more than a quarter-century, commentators have deplored the term as "so vague and overused in labor law that it provides little guidance to disputants or decision makers." Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 Cornell L. Rev. 245, 253 (1987). It has long been criticized as "a buzz word for any argument relying on the national interest distinct from the narrow aims of labor or management." *Id.* (discussing federal labor-relations law) (footnote omitted); *see also*

Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. Chi. L. Rev. 1012, 1017 (1984) (consigning "industrial peace" to a group of "formulas repeated until they have become platitudes").

Little has changed. The State's interest in the success of its Medicaid programs—critical though those programs may be—is not synonymous with the "familiar doctrine[]" of industrial peace. *See Abood*, 431 U.S. at 220. Again, industrial peace refers to the State's interest in stabilizing uniquely workforce-centered relations by means of a designated bargaining representative. *See Maryland v. Wirtz*, 392 U.S. 183, 191 (1968); *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180; *cf. Street*, 367 U.S. at 775 (Douglas, J., concurring). There is a "crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor to manage [its] internal operation[s].'" *Engquist*, 553 U.S. at 598 (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). And the State's bare recitation of "labor peace" does not change matters. When the First Amendment is implicated, the determination whether a state has shown a compelling interest "is not to be made in the abstract." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000). "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964) (citation omitted); *see also Awad v. Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012) ("[O]verly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest."); *cf. Gilardi v. U.S. Dep't of Health & Human Servs.*, --- F.3d ----, 2013 WL 5854246, at *10 (D.C.

Cir. Nov. 1, 2013) (deeming government's "*ipse dixit* . . . [in]sufficient to survive strict scrutiny").

Even if the State's asserted interest were compelling, it is not clear that the interest is served by unionization—let alone that the agency-shop arrangement is "carefully tailored" to advance that interest. *See Knox*, 132 S. Ct. at 2292. High turnover, low morale, excessive absenteeism, poor training, and lack of productivity—the ills cited in the State's opposition brief—relate to personal assistants' dealings with their private customers. Training, for example, is exclusively the province of the customer. Ill. Admin. Code tit. 89, § 676.30. Absenteeism and lack of productivity, too, fall under the customers' duty to "direct[], evaluat[e,] . . . otherwise supervis[e]," and "impos[e] . . . disciplinary action against" their personal assistants. *Id.* The State is categorically excluded from these matters. *Id.* § 676.10. Compelling payments so that a union may bargain with the State on matters in which the State has neither "control [n]or input," *id.*, does not "defus[e] and channel[] conflict between labor and management," *Bildisco & Bildisco*, 465 U.S. at 548. Nor does "the union's exercise of this extraordinary power" further any other plausible state interest. *Davenport*, 551 U.S. at 184.[4]

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4. Coerced union funding cannot be sustained under the "free-rider" theory either. The government's "anomalous" interest in eliminating free riders is wholly derivative of the "interest in furthering 'labor peace.'" *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2290 (2012) (citation omitted). Outside that context, the "free-rider argument[] ... [is] generally insufficient to overcome First Amendment objections." *Id.* at 2289; Br. of Pet'rs 34-35.

In fact, coercing personal assistants to back unions disrupts the balance of responsibilities contemplated in the Medicaid programs themselves. These programs serve to empower beneficiaries by allowing them to preserve their autonomy and "retain control over the services they receive." Ill. Dep't of Human Servs., *Home Services Program DHS 4243*, http://www.dhs.state.il.us/page.aspx?item=36737 (last visited Nov. 27, 2013); Ill. Dep't of Human Servs., *Division of Developmental Disabilities Waiver Manual: V. Self-Directed Services and Individual Budgeting*, http://www.dhs.state.il.us/page.aspx?item=52804 (last visited Nov. 27, 2013); Br. of Pet'rs 8. To that end, Rehabilitation Program regulations exclude the State from inserting itself into "the employment relationship between the customer and the personal assistants." Ill. Admin. Code tit. 89, § 676.10; *see supra* 14-16.

Yet despite a statutory guarantee that unions would bargain with the State only on matters "that are within the State's control," 20 Ill. Comp. Stat. 2405/3(f), the resulting collective-bargaining agreement encroaches on the rights of private customers. For example, as noted, Illinois regulations assure each customer the exclusive power to control personal-assistant training. Ill. Admin. Code tit. 89, § 677.200(g). But Respondents' collective-bargaining agreement intrudes directly on customer discretion in that sphere, mandating that all new personal assistants complete a State-run orientation program and authorizing a joint union-State committee to develop a "schedule of orientations" and "guidelines for completing orientation." Agreement Between the State of Ill., Dep'ts of Cent. Mgmt. Servs. & Human Servs., and the Service Employees, Int'l Union, Local 880 Art. IX § 1 (2012), *available at* http://

www2.illinois.gov/cms/employees/personnel/documents/emp_seiupast.pdf. The agency-shop arrangement is not just detached from any compelling state interest; it does the State's Medicaid programs an open disservice.

III. The Seventh Circuit's Deferential Review Does Not Square with First Amendment Principles, and It Invites Abuse.

For the past half-century, this Court has rebuffed invitations to "extend [agency-shop decisions] beyond their proper ambit." *Davenport*, 551 U.S. at 185. Not only did the Seventh Circuit's analysis depart from that precedent, it broke faith with First Amendment principles at a fundamental level. Where government trenches on its citizens' First Amendment rights, "[p]recision of regulation must be the touchstone." *Hudson*, 475 U.S. at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (vagueness gives rise to "ad hoc and subjective" abuse). Yet in the Seventh Circuit, a state's decision to coerce support for unions answers to no limiting principle at all; citizens can qualify as public employees if they operate anywhere on an undefined spectrum of governmental control.

In an increasingly regulated private sector, this reasoning has profound consequences. Petitioners and other *amici* have identified an array of private actors who could be labeled "public employees" under the Seventh Circuit's analysis, from Social Security recipients to government contractors, from doctors to court-appointed lawyers, and even subsidized childcare providers (for whom Illinois has already authorized mandatory representation).

See Br. of Pet'rs 48-55; *see also* Amicus Br. of Cato Inst. 22-24; Amicus Br. of Ctr. for Constitutional Jurisprudence 11.

On the Seventh Circuit's reasoning, state-backed unions could conceivably intrude even further into the family unit. Take foster parents, for instance. Unlike personal assistants, Illinois unquestionably exerts "substantial control" over foster families. Foster parents must "accept agency supervision," Ill. Admin. Code tit. 89, § 402.12(f), submit to background checks, *id.* § 402.12(b), and complete agency-approved trainings, *id.* § 402.12(k)-(m). Those who own pools, hot tubs, or "outdoor fountains" must obtain CPR certification. *Id.* § 402.8(d)(5). Indoors, "[t]he springs and mattresses on each bed . . . shall be level, clean, unsoiled with no rips, tears or sags in the mattress or mattress cover . . . ." *Id.* § 402.9(k). In return, foster parents are entitled to payment from the State "commensurate with the care needs of the child as specified in the service plan." *Id.* § 340.40(a)(4); *see also id.* § 347.70(a)(1) (Grievances are adjudicated by a State agency through procedures "developed with input from foster parents"). In the Seventh Circuit, presumably, the State's decision to authorize unions to coerce fees from foster parents would be a clear-cut case. And the prospect is far from hypothetical; earlier this year, Oregon lawmakers considered a bill that would designate foster parents as "public employees" with "the right to form, join and participate in the activities of labor organizations . . . ." S.B. 570 77th Leg. Assemb., Reg. Sess. (Or. 2013).

Like the unions that pressed an unacceptably "broad definition of germaneness" two Terms ago, *see Knox*, 132 S. Ct. at 2295, Respondents here invite a boundless

conception of "public employees." The Seventh Circuit accepted Respondents' view, though it tried to soften the blow by addressing itself only to the parties' controversy. *Harris*, 656 F.3d at 699 ("We once again stress the narrowness of our decision today."). But the court's respect for that "essential limit" on judicial power does not reduce the weight of its ruling. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). "Precedents once established often gain momentum by the force of their existence." *Lathrop v. Donohue*, 367 U.S. 820, 878 (1961) (Douglas, J., dissenting). This Court should thus reaffirm that coerced union support—like all other forms of compelled association—is constitutional only in the "exceedingly rare" case in which a state actor meets exacting scrutiny. *Knox*, 132 S. Ct. at 2289. "[E]xceptional circumstances should be shown," *Lathrop*, 367 U.S. at 882 (Douglas, J., dissenting), and Respondents have offered none here.

CONCLUSION

For all of the reasons set forth herein and all those set forth in Petitioners' brief, *amici curiae* Albert Contreras, Patricia Griggs, and Jonathan Kiss respectfully request the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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November 29, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* FAMILY CHILD CARE INC., *et al.*, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment Right of Association of home healthcare providers may be impaired by State compulsion imposing union representation upon them.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amicus curiae Family Child Care Inc. ("FCCI") (Olmsted County Child Care Association), is a voluntary trade association in Rochester, Minnesota, which has served licensed family child care providers in southeastern Minnesota since 1973. *See* www.fccimn.com.

Amicus curiae Connecticut Family Daycare Associations Network Inc. ("CFDCAN"), is a 501-C6 trade association in Sandy Hook, Connecticut, which has served licensed child care providers in Connecticut since 1987. *See* cfdcan.org.

Amicus curiae Professional Family Childcare Providers Network ("PFCPN"), is a child care provider group in Newton, Massachusetts, which has served child care providers since 2005.

Amicus curiae Providers Networking ("PN") is a child care provider group in Overland Park, Kansas, which has served licensed family child care providers in Kansas since 2005.

These four associations ("*amici* associations") each offer training and resources to child care providers, work directly with state agencies on

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[1]Counsel for a party did not author this brief in whole or in part or make a monetary contribution intended to fund its preparation or submission, nor did any other person or entity, other than the *amicus curiae*, its members or counsel, make such a monetary contribution. The parties filed blanket consents with the Clerk for the filing of all amicus curiae briefs in the case.

matters related to child care and lobby their respective state legislatures on matters of public policy relating to child care.

Although the *amici* associations therefore provide an alternative to unions,[2] they each face in their respective states the same prospect of forced association with unions as the providers in this case and they each oppose this on various grounds.

The Center on National Labor Policy Inc. ("Center") is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. The Center has filed briefs amicus curiae advocating the validity of this public policy interest in other cases before this

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[2]"Providers already have many organizations working on their behalf such as the National Association for Family Child Care (www.nafcc.org) and state-wide child care associations like Minnesota Licensed Family Child Care Association (www.mlfcca.org)." www.childcareunioninfo.com. "Associations accomplish the same things a union can, however, the cost of dues is far less and membership is completely voluntary." *Ibid.* (emphasis omitted). "Association dues are approximately $30-$50 per year while union dues start around $300 per year." *Ibid.*

court, including *Granite Rock Co. v. Teamsters, Local 287*, No.08-1214; *Larry V. Muko Inc. v. NLRB*, No. 80-1798; and *New York Telephone Co. v. N.Y.S. Department of Labor*, No. 77-961.

The parties will focus on the constitutional and jurisdictional issues in this case. Equally important, however, and critical to establishing the context for evaluating these questions, are their national implications and the strong public policies in favor of protecting federal statutory and constitutional rights through judicial proceedings, particularly in labor cases.

The interests of the *amici* associations and the Center's commitment to the public interest are at stake in these questions. Beyond these particular issues, however, the *amici* have an interest in the protection of the right of judicial review, particularly in labor cases, and in the accountability of the government and labor unions generally, both of which are challenged by the position of Governor Quinn and the unions in this case.

The *amici* do not doubt that the parties will fully argue their own interests in this case and defend them through settlement or otherwise, but those interests do not necessarily coincide with the interests of the *amici* association and of other providers who are not parties herein or with the public interest.

The *amici* are in a unique position to fully advocate the rights of the public and of those individuals who would suffer from any compromise

of the important policies at stake in this case.

The participation of the *amici* will therefore bring to this case a diverse perspective not presently represented and assist this court in fully considering the public interest.

SUMMARY OF ARGUMENT

The challenged provisions mandating involuntary association violate the First Amendment by distorting the "marketplace of ideas" which it creates, thereby reducing competition and the amount of care, silencing individual providers and hindering their effectiveness.

ARGUMENT

FIRST AMENDMENT ASSOCIATIONAL RIGHTS ARE DISTORTED AND INDUSTRY COMPETITION IS REDUCED AND IMPAIRED BY THE STATUTORY MECHANISMS IMPOSING UNION REPRESENTATION UPON HEALTH CARE PROVIDERS

In addition to the reasons set forth in the Brief for Petitioners, The *amici* here each support the position of Pamela Harris and the other caregivers in this case on the following grounds:

1. Exclusive representation granted to unions, by allowing closed door negotiations on matters of public policy, gives the unions

preferential treatment and thereby hinders the ability of the *amici* associations to effectively lobby on behalf of their members.

2. Collectivization of thousands of private businesses which are competitors with each other, and the creation of a mandatory and exclusive representative for these businesses which compels them to lobby the legislature and bargain with the state through one entity, silences the voices of individual businesses.

3. Each *amici* supports the First Amendment right of each member of each *amici* association to associate freely, and not to associate with, organizations of their choosing.

FCCI, CFDCAN, PFCPN and the Center each supports the position of Harris and the other caregivers in this case on the additional ground that compulsory fees create a hardship for private businesses and further violate their rights by the use of dues and fees for political purposes. *See* n. 5, *infra*.

PFCPN and PN each supports the position of Harris and the other caregivers in this case on the additional ground that their respective states have gone outside of traditional federal and state labor law to recognize unions as the exclusive representative of private child care businesses without majority support in secret ballot elections. *See* nn. 3-4, 7, *infra*. The Center also supports the position of Harris and the other caregivers in this case on this additional ground.

"[E]ighteen (18) states have authorized mandatory representation for home childcare providers, and fourteen (14) permit or permitted the exaction of compulsory fees." Brief for Petitioners, p. 54. "Providers" may include "individuals who ... provide care in their own homes to children to whom they are related (i.e., grandparents, aunts, adult siblings, etc.)." Petition for Writ of Certiorari in *Schlaud v. International Union, UAW*, 82 USLW 3101 (August 19, 2013) (No. 13-240) ("*Schlaud* Petition") pp. 2-3; *see also* Appellants' Brief in *Parrish v. Dayton* (September 26, 2013) ("*Parrish* Brief") p. 3 ("grandparents, aunts, or uncles").

A recent article notes that these schemes share several common features: an entity is designated by the state as the representative of providers[3] for the purpose of speaking with a specific

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[3]"When a union wins recognition through an executive order or a vote, it then represents every provider within the bargaining unit, even those who do not want representation." www.childcareunioninfo.com (emphasis omitted). In Illinois, "about 14,000 chose unionization for nearly 50,000." *Ibid.* "Iowa is a right to work state and does not allow fair share fees. This does not stop the union from claiming to represent all providers, member or not." *Ibid.* In Kansas, "[n]early a year after negotiating a contract with the state on behalf of the 6600 child care providers AFSCME admitted that only about 100 of the providers had actually joined the union and were full members." *Ibid.* In Maine, "[w]ith little to no benefits of joining the union, membership was low with only about 200 of the 2200 eligible providers choosing to join." *Ibid.* In Minnesota, "[t]his union, which will be comprised of predominantly unlicensed caregivers, will be able to negotiate

exclusively with the state on issues that impact all licensed family child care providers." *Ibid.* (emphasis omitted).

In Maryland,

> The union ... represents all providers on the subsidy program, whether they voted or even if they voted ....
>
> A year and a half after unionizing, only about 1000 providers had chosen to join the union. That means over 4000 providers were exclusively represented by a union they did not want to join.

Ibid.

In Washington State, SEIU

> now represents all providers who care for a child on the assistance program regardless of if they voted or how they voted, or if they were even eligible to vote at the time of the election.

Ibid.

Further, in Michigan, the union actively lobbied the state legislature as providers' representative and actively participated in registering providers for the Democratic Party and in assisting Democratic Presidential campaigns even where it had been recognized as providers' exclusive representative only with a state Council, not with a state department or with the state itself and where the Council merely made recommendations which the state usually disregarded. Plaintiffs' Brief in Support of Plaintiffs' Motion for Summary Judgment in *Schlaud v. Snyder*, Case No. 1:10-CV-147 (W.D.Mich.) (March 11, 2011) ("*Schlaud* Brief") pp. 2, 16.

In Illinois, "SEIU and child care advocates have successfully worked together since 2006 to secure subsidy rate increases for child care centers, although centers are not covered by the agreement or part of the bargaining unit."

state body, usually pursuant to a mail-ballot election;[4] the purpose for the representation is to

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National Women's Law Center, *Getting Organized: Unionizing Home-Based Child Care Providers 2010 Update* (2010) ("*Getting Organized 2010*") pp. 7-8.

[4]"The election process for FCC [family child care] and FFN ["family, friend and neighbor"] providers has been somewhat less formal than the process used by public-sector or private-sector employees," National Women's Law Center, *Getting Organized: Unionizing Home-Based Child Care Providers* (2007) ("*Getting Organized* 2007") p. 9, and the voting is often flawed. In Illinois,

> [t]hose eligible to vote included grandparents caring for their grandchildren and Family, Friend or Neighbor caregivers that were not running a licensed family child care business. Because the vote only included those caring for children on the subsidy program, many licensed, professional family child care providers were excluded from the vote. Many providers in Illinois didn't even know an election was happening as this election was not highly publicized.

www.childcareunioninfo.com. In other words, the burden of discovering the election was shifted to the providers. *Cf. Knox*, 132 S.Ct. at 2290 ("[R]equiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues – as opposed to exempting them from making such payments unless they opt in – represents a remarkable boon for unions .... An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree") and 2292 ("a nonmember cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent").

In Connecticut, "ballots were sent by mail," but "many of the addresses were incorrect." *Ibid.* "Of the 10,560 registered providers in Maryland at the time, [Governor] O'Malley's Executive Order limited the election to 5818 providers." *Ibid.* "The providers in Massachusetts were denied the right to a secret ballot election" when Governor Patrick signed a bill "creat[ing] a bargaining unit of approximately 4000 child care providers" even though "a ballot initiative that would have unionized providers in 2006 ... was rejected by voters." *Ibid.* In Washington State, "[m]any licensed providers were excluded from the vote." *Ibid.*

In Michigan,

> [m]any registered child care professionals were excluded from the vote .... Out of 40,500 eligible voters, only 5921 voted in favor of unionization. This means fewer than 15% unionized the entire bargaining unit. It also means 34,579 independent child care providers became exclusively represented by a union they didn't vote for.

Ibid. A state Council previously had declared the union the exclusive representative of all home childcare providers for purposes of dealing with the Council predicated on a private arbitrator's certification that a majority of providers had signed authorization cards for the union. *Schlaud* Petition p. 3.

In Minnesota,

> [w]hile only about half of the current licensed providers are eligible to vote, thousands of unlicensed caregivers will get a ballot, including about 75% of those who are no longer providing care.

www.childcareunioninfo.com.

In Kansas,

> [p]roviders were not given the right to a secret ballot election. Instead, cards collected by union organizers in a door to door campaign were used to show support and counted as yes votes. Providers have reported that they were not aware of the union organizing drive until they read about it in the paper.

Ibid.

In Wisconsin,

> [u]nion organizers went door to door collecting signatures on cards. These cards were used to show a majority of support for unionization and the providers were not given the right to vote in a secret ballot election. Any provider who signed a card was considered to be in support of a union and his/her card was counted as a yes vote.

Ibid.

Similarly, in New Jersey, "providers were denied the right to a secret ballot election," "[u]nion organizers collected signatures on cards during a door to door campaign and these cards were counted as yes votes." *Ibid.*

And door to door campaigns contain notorious irregularities:

> Union organizers are supposed to wear identification, however, providers have reported that organizers have come to their homes without identification and have even claimed to be from other organizations like Child Care Aware or the food program ....

influence how the state administers aspects of a public aid program that affects the providers; the state body is obliged to meet and deal with the representative on this issue, with the objective being to reach an agreement that governs what the state body will attempt to do with respect to the program; the agreements between the state body and representative require that all providers pay fees to the representative, which are generally deducted directly from the monies owed to providers for caring for participants in state HCBS and childcare programs;[5] the state-designated representatives

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> Providers have reported organizers using unethical tactics to obtain signatures on cards ....
> Organizers usually come during business hours when providers are busy caring for children ....
> Organizers often come back again and again ....
> Often times, unions hire organizers from out of state and fly them in to do this type of organizing. They are trained in ways to obtain signatures and avoid answering questions.

Ibid.

[5]"Since the first child care union was formed in 2005, unions have siphoned tens of millions of dollars from the child care assistance programs, even as many of those programs faced funding reductions." www.childcareunioninfo.com. In Illinois, "[t]he first contract reached by the union was estimated to cost the state $250 million dollars [sic] for the first 3 years" and

> SEIU has siphoned over $60 million dollars [sic] from the child care assistance program. That's around $10 million dollars [sic] per year taken from child care providers, most of whom did not choose SEIU as their exclusive representative.

Ibid.

A response from the Illinois Department of Human Services to a FOIA request reveals the following breakdown of the more than $60 million paid to SEIU from child care assistance payments in Illinois: $36,620.13 in 2006; $7,933,202.69 in 2007; $7,517,094.47 in 2008; $7,847,614.31 in 2009; $8,416,432.98 in 2010; $9,885,992.42 in 2011; $9,899,740.07 in 2012; and 8,538,699.28 in 2013 through July 10, 2013 (all years are Fiscal Years).

"[T]he Washington legislature included in its 2007-09 budget nearly $86 million to fund the contract." *Getting Organized 2010* p. 9.

A response from the Washington State Department of Social & Health Services ("DSHS") to a similar request reveals the following breakdown of more than $1 million paid to SEIU in less than a three-month period in 2007: $237,748.95 on September 17; $46,616.83 on October 8; $294,140.95 on October 12; $248,488.70 on November 9; $759.08 on November 28; and $263,854.52 on December 11.

An Excel spreadsheet from the Washington State Department of Early Learning ("DEL") reveals an additional $7,423,695.22 paid to SEIU from child care assistance payments in Washington State since Fiscal Year 2009, and DEL indicates that DSHS "is working on producing the data for *the remaining* list of child care assistance payments on behalf of child care providers for union dues" (emphasis added).

In Oregon, "[t]he Legislative Fiscal Office estimated that the initial contracts would cost the State around 75 million dollars." www.childcareunioninfo.com.

In Michigan, union dues were 1.15% of the subsidy check. *Ibid.* The state enforced the seizure of more than $4 million in compulsory union fees even though most of the other terms of the contract were never implemented. *Schlaud* Petition p. 4. The implementation of this seizure of fees cost the state approximately $1 million. *Schlaud* Brief p. 9.

Union membership dues are up to $900 per year in Illinois, $700 per year in New York, $660 per year in Oregon, $600 per year in Washington State and $300 per year and "likely to go up" in Minnesota and were $35 per month in Iowa and $25 per month in Kansas and Ohio. www.childcareunioninfo.com.

"All local unions must follow bylaws and rules determined by the National Union, whether or not those bylaws or rules support this profession." *Ibid.* "A large portion of union dues goes out-of-state to the National Union and many of these dollars are not even used for the benefit of child care providers." *Ibid.* "Unions spend millions of dollars each year supporting political candidates and causes." *Ibid.*

In Minnesota,

> [a]ccording to AFSCME Council 5 constitution and bylaws, around $21 per month out of the dues and fees paid to the local union must be sent to the state affiliate. Some of this will then be sent out of state and not even used for child care in Minnesota.

Ibid.

"The unions have assessed fair share fees to non-members in every state in which they are legally permitted to do so," including Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New York, Ohio, Oregon ("$25 per month"), Rhode Island, Vermont and Washington State. *Ibid.* "These fees are typically close to the same amount as full dues." *Ibid.* For example, in Ohio, the fair share fee was "$25/month," the same as members' dues. *Ibid.*

In Maryland,

> [w]hile providers were initially successful in blocking "fair share fees" for those who choose not to be members, that has since been changed and now all those in the bargaining unit (represented by the union) are required to pay a fee.

Ibid.

In Rhode Island, "nonmembers will be required to pay fair share fees which could be as high as full member dues." *Ibid.* New York assesses fees even on "providers not participating in the child care assistance program." *Ibid.*

have all been unions, usually affiliates of the Service Employees International Union ("SEIU") or American Federation of State, County, and Municipal Employees ("AFSCME"); and the schemes have been implemented under administrations politically supported by these unions.[6] *See* W.L. Messenger, *Does the First Amendment Allow States to Compel Recipients of Government Monies to Support State-Designated Representatives?*, Engage: Vol. 11, Issue 2 (2010), pp. 88-89.[7]

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[6]In New Mexico, "Governor Richardson signed that contract on his last day in office sparking an outcry from newly elected Governor Martinez." www.childcareunioninfo.com. In Ohio, "Governor-Elect Kasich indicated his intent to reverse the Strickland-era executive orders. Not surprisingly, the statement drew strong rebuke from the two unions who represent the employees." *Ibid.* In Michigan, it was then-Governor Granholm and the union who initiated the unionization in 2005, *Schlaud* Petition p. 3, and newly-elected Governor Snyder who dissolved the Council and stopped the automatic deduction of compulsory union fees in 2011, *id.* at p. 5. In 2007, the National Women's Law Center wrote that "[a]lthough the governors of four states – California, Massachusetts, New York, and Rhode Island – have vetoed legislation to authorize unionization and negotiation, the election of new governors in two of these states may lead to renewed union efforts." *Getting Organized* 2007 p.5.

[7]"Another common feature is that all state schemes use labor law terminology, such as 'exclusive representation' and 'collective bargaining.' Indeed, some state schemes define providers as 'public employees' solely for purposes of a public sector-bargaining statute, but for no other purpose." *Id.* at 89 (citations omitted).

"[H]ome-based child care providers are not in a traditional employer-employee relationship that permits them to unionize." *Getting Organized 2010* p. 6. However, Illinois has declared providers "public employees" solely for purposes of

The article goes on to point out that providers, like many other groups such as public-aid recipients, contractors with government, financial institutions, automobile companies and others, are simply a group of citizens who receive monies from a government program. States are compelling this particular group of citizens to support an entity for the purposes of speaking with state bodies to influence the administration of the government program that affects them.

At issue is compulsory political representation. The representation imposed upon providers would be like the government designating the American Association of Retired Persons as the mandatory representative of all senior citizens on Medicare; ACORN as compulsory voice of all individuals who receive government-subsidized housing; or the American Banking Association as the mandatory trade association for all financial institutions receiving Troubled Asset Relief Program

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unionization. *See* Brief for Petitioners pp. 9-11. Similarly, the Minnesota Family Child Providers Representation Act, Minn. Stat. §§179A.50-52, considers family child care providers "state employees" "for purposes of the Public Employment Labor Relations Act" but "not ... for any other purpose" even though Minn. Stat. §119B.09(8) provides that "receipt of federal, state, or local funds by a child care provider ... does not establish an employee-employer relationship between the child care provider and the ... state" and the Child Care Assistance Program ("CCAP") Guide states that "CCAP is not your employer." *Parrish* Brief pp. 3-4. The executive order recognizing AFSCME in Kansas in 2007 also reclassified private child care businesses as state employees for the sole purpose of collective bargaining.

funds, and then forcing the members of each group to pay these organizations to lobby the government for more money and benefits from these programs.

The implications are vast:

> Most troubling are the implications of the asserted interest: that a state can designate a compulsory voice for citizens if it deems that they do not adequately voice their views voluntarily. This purports a state interest in dictating the degree to which individuals should engage in core First Amendment activities. It also assumes a state interest in dictating how much political influence particular groups of citizens should wield. If this is accepted as a legitimate state interest by the courts, matters once exclusively reserved to individual choice under the First Amendment – choosing whether and how to speak to and petition the government for a redress of grievances – will be subject to the tyranny of the majority ....
>
> If it is held constitutional to compel providers to support state-designated lobbying representatives, states and Congress will be free to impose similar types of representation on other groups ....
>
> [S]tate-designated representation alters the fundamentals of the political

> process by granting government officials the ability to artificially empower special interest groups to support their agendas. An advocacy group that individuals must support financially as a condition of receiving public benefits, and that enjoys special privileges in lobbying the state, will naturally have resources that far exceed what citizens would provide to it voluntarily. Thus, that group will wield political influence that exceeds citizens' voluntary support for the group and its agenda. This necessarily distorts the "market place" of competing ideas upon which the democratic process is predicated.[8]

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[8]"Child care unions are now facing more resistance than ever before." www.childcareunioninfo.com. According to a survey of licensed family child care providers in Minnesota, 86.3% opposed formation of a union of licensed family child care providers and only 5.54% supported it; the survey was designed and circulated by the Minnesota Licensed Family Child Care Association during March 7-13, 2013, and had a 20% return rate. *See* www.fccimn.com.

However, further distortion of the "marketplace of ideas" would exacerbate the problem which already exists that voters who support unionization often do so because of misunderstanding.

In Illinois,

> [m]any of those who voted for SEIU did so believing they would get health insurance as this was one of the benefits touted by union organizers. After the first contract was negotiated it was clear that

> benefits would be limited to a small percent.

www.childcareunioninfo.com. Although the legislature appropriated $27 million for the health insurance program, no more than 5000 out of 49,000 providers participated. *See Getting Organized 2010* pp. 7-8.

Overall, "[o]nly a tiny percent of child care providers who pay dues or fees have obtained any form of health insurance" and, of course, "[a]ll benefits negotiated by a union with the state are subject to legislative funding." www.childcareunioninfo.com; *accord*, *Getting Organized 2010* p. 9 ("the agreement was contingent on the legislature's approving the funds necessary to implement the agreement").

In Illinois,

> [w]hile the union has been able to negotiate minimal increases to the child care assistance reimbursement rates, these increases have barely managed to keep up with the rising cost of child care. Union free Minnesota child care providers get higher reimbursement rates than their unionized counterparts in Illinois.

www.childcareunioninfo.com.

In Maine, "[i]n the first contract, the union was not able to negotiate health insurance or even a raise in the child care assistance reimbursement rates." *Ibid.* In Maryland, "providers ... have not seen any health insurance." *Ibid.* In Minnesota, "[t]he majority of child care providers paying dues and fees have not received any tangible benefits in return. Only a tiny percent have received health insurance." *Ibid.* In New Mexico, "[t]he contract did not give the providers a raise in subsidy rates and did not give them any health insurance benefits." *Ibid.* In Oregon,

> [i]n the contract for licensed providers, the union was not successful in negotiating a raise in the child care assistance reimbursement rates ....

> In Federalist No. 10, James Madison warned of the dangers posed to democratic governance by "factions" of individuals united for narrow, rent-seeking purposes. A compulsory faction, artificially created by the state for the very purpose of advocating for a defined group of citizens on a discrete issue, raises this danger to a new level.

Id. at 90 (citations added and omitted); *see also* Brief for Petitioners pp. 49-56.

> They were not successful in negotiating health insurance into a contract for the providers.

Ibid. Unions have also failed to obtain health insurance in Iowa, Kansas, Massachusetts, Michigan, New Jersey, Ohio, Oregon, Rhode Island, Vermont and Wisconsin. *Ibid.*

> Washington State
>
> > is one of the few states that have negotiated limited funding to purchase health insurance for providers. As in the other states this has happened, the number of providers who can be on the insurance program is capped. In Washington, the program allows for up to 600 providers (less than 10% of those paying dues and fees) to get some form of health insurance. Only the provider is covered, his/her family is not and the provider must meet strict requirements.

Ibid.

Government distortion of the "marketplace of ideas" is very serious, for

> [t]he First Amendment creates an *open* marketplace in which differing ideas about political, economic, and social issues can compete *freely* for public acceptance, *without improper government interference*. The government may not prohibit the dissemination of ideas that it disfavors, *nor compel the endorsement of ideas that it approves*.

Knox v. Service Employees International Union Local 1000, 132 S.Ct. 2277, 2288 (2012) (emphasis added, citations omitted) (holding that union violated First Amendment rights of objecting nonmembers by requiring them to pay a special assessment); *see also Agency for International Development v. Alliance for Open Society International Inc.*, 133 S.Ct. 2321, 2327 (2013) ("*AID*") ("It is ... a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say. At the heart of the First Amendment lies the principle that each person should decide *for himself or herself* the ideas and beliefs deserving of expression, consideration, and adherence") (emphasis added, citations omitted) (holding that requiring affirmation of a belief as a condition of federal funding violates First Amendment). Further, "compelled funding of the speech of other private speakers or groups" is "[c]losely related to compelled

speech and compelled association." *Knox*, 132 S.Ct. at 2288.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977), *reh'g denied*, 431 U.S. 915 (1977), the court specifically found that "public employee unions attempt to influence governmental policymaking." As Justice Rehnquist's concurring opinion notes,

> [s]uccess in pursuit of a particular collective-bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way.

Id. at 243. The court accepted the tension placed on the First Amendment. *See id.* at 231. But Justice Powell's vigorous concurring opinion correctly predicted what would become a grant of unlimited power to public sector unions unless more than a "relationship" to collective bargaining was adopted both as a restraint on unions and as protection for First Amendment rights. *See id.* at 261 n. 16.

Knox makes clear that

> we did not call for a balancing of the "right" of the union to collect an agency fee against the First Amendment rights of nonmembers .... Far from calling for a balancing of rights or interests,

> *Hudson*[9] made it clear that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights. And to underscore the meaning of this careful tailoring, we followed that statement with a citation to cases holding that measures burdening the freedom of speech or association must serve a "compelling interest" and must not be significantly broader than necessary to serve that interest.

132 S.Ct. at 2291 (citation added). After *Knox* and *AID*, *Abood* cannot stand.

In addition, the negative effect of unionization on competition is evident from the reduction in care which has, empirically, accompanied it. Illinois' experience has been summarized as follows: "High dues, more tax dollars, fewer children served, fewer child care providers, insignificant increases and few benefits." *See* www.childcareunioninfo.com.

Unionization "has resulted in many families losing their assistance after budget cuts and has forced some states to implement a waiting list for eligible families," *ibid.*:

> One accomplishment the unions were able to make in some states in which

---

[9]*Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986).

> they reached a contract was to increase subsidy rates. However, when subsidy rates are locked in, cuts to the program cannot be made by reducing rates; cutbacks must come from somewhere else. This has resulted in many families losing their assistance after budget cuts and has forced some states to implement a waiting list for eligible families.

Ibid.

Specifically in Illinois, "fewer families can now qualify for assistance," *ibid.*:

> One of the benefits of the contract was an increase in child care assistance rates. Those who saw the biggest raise were the unlicensed family, friend, neighbor providers. The contract locked subsidy rates in at a higher rate. While this seems like a great thing, one of the unintended consequences is that fewer families can now qualify for assistance. When there is a budget shortfall and cuts must be made, they can no longer cut rates, instead they must cut families from the program ....
>
> In between 2005 and 2011, the number of children served through the Federal CCDF child care assistance fund has dropped by 20,000 even though funding has gone up. In 2005,

> there was over $40 million dollars [sic] less in total CCDF child care assistance expenditures than in 2011 yet they were able to serve 20,000 more children with the program in 2005 with less money.

Ibid.

Predictably, there has been a corresponding decline in the number of providers in Illinois:

> Since unionizing in 2005, the snapshot of family child care looks very different. Despite having more than double the population than union free Minnesota, Illinois now has fewer licensed family child care providers than Minnesota. The number of legally unlicensed caregivers has also dropped dramatically by over 10,000 since the union was recognized.

Ibid.

Similarly, in Washington State,

> SEIU also negotiated a raise in subsidy rates and got the rates locked in through their contract. This has proved to have unintended negative consequences though. In 2011, when a 6.3% budget cut was ordered, reducing subsidy rates was not an option so in

> order to meet the cuts 4000 low income families were notified that they would be losing their child care assistance and were being kicked out of the program. While a cut in subsidy rates is not desirable, a 10% cut would be better than losing ones [sic] assistance all together [sic].

Ibid.[10] [11]

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[10]The divisiveness of unionization also may reduce quality:

> Rep. John Scibak (D-South Hadley[, Massachusetts]), co-chair of the Public Service Committee, stated: "I am concerned that this legislation has driven a wedge within the field and among providers that I'm not sure is necessarily a good thing in terms of quality and access."

www.childcareunioninfo.com.

In Maryland "[t]hese measures were fought by child care providers" and in Michigan "[c]hild care providers sued in Federal court." *Ibid.* In Rhode Island, Governor Carcieri, vetoing a previous attempt to unionize, "called it an 'unmitigated legal and financial disaster' for both taxpayers and the state's child-care system." *Ibid.* "In Vermont child care providers joined together and spent countless hours fighting efforts to pass child care union legislation for two years in a row, most recently killing a child care union bill in committee in March of 2013." *Ibid.* In Wisconsin, "[w]hile the Governors [sic] recommendations were being debated, union organizers, employees and supporters were protesting at the Capitol." *Ibid.* California recently succumbed.

In Minnesota,

> [w]hen providers learned of the possibility of involuntary unionization, they worked together and fought back ....

> Two separate lawsuits were filed ....
> Providers showed up at each hearing to testify against this bill. At times, providers who signed up to testify in opposition were turned away. This bill set a record for the longest floor debate in the Minnesota Senate with a marathon 17 hour overnight session.

Ibid.

[11]Since "[c]hild care providers .... are not covered under the National Labor Relations Act" and "[i]n many cases, they are not covered by any state labor laws," "they have no way to decertify or break free from the unions once those unions are recognized." www.childcareunioninfo.com.

Further,

> [s]ince child care providers are spread out across the state, even in the states where providers do have the legal means to file a decertification petition, it would be near impossible for them to collect enough signatures to file a decertification petition as it would entail them going door to door across the state to collect these signature [sic].

Ibid.

Notwithstanding these difficulties, in Iowa "the original Executive Order [granting bargaining rights to child care providers] was repealed"; in Kansas "the Executive Order granting bargaining rights is now defunct"; "[t]he Maine legislature voted to overturn the union and the repeal was signed into law"; in Michigan "the State had to agree never to force child care providers into a union again"; in New Jersey "the Executive Order unionizing providers is now defunct"; in Ohio "[t]he unions were repealed"; and in Wisconsin "[c]hild care providers were part of the group that lost bargaining rights under Governor Walker." *Ibid.*

CONCLUSION

For these reasons and those set forth in the Brief for Petitioners, the Court should grant the relief which the providers seek in this case.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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PAMELA HARRIS, ET AL.,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* HOMECARE HISTORIANS IN SUPPORT OF RESPONDENTS

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BRIEF FOR *AMICI CURIAE*

INTERESTS OF THE *AMICI CURIAE*

Amici are scholars who have researched and written extensively on the history of homecare.

Eileen Boris holds the Hull Endowed Professorship and is Chair of the Department of Feminist Studies and Professor of History, Black Studies, and Global Studies at the University of California, Santa Barbara. She is a historian of women's work and the history of social and labor policy and has had fellowships from the Danforth Foundation, the National Endowment for the Humanities, the Smithsonian Institution, the Woodrow Wilson Center, the Fulbright Foundation (Bicentennial Chair in American Studies, University of Helsinki), and the Rockefeller Foundation, among others. For over 30 years she has specialized on the home as a workplace. Among her books are *Home to Work: Motherhood and the Politics of Industrial Homework in the United States* (1994), winner of the 1995 Philip Taft Prize for the best book in Labor History; the co-edited *Intimate Labors: Cultures, Technologies, and the Politics of Care* (2010); and, with Jennifer Klein, *Caring for America: Home Health Workers in the Shadow of the Welfare State* (2012), winner of the Sara Whaley Prize for the best book on women and work from the National Women's Studies Association.

Jennifer Klein is Professor of History at Yale University, specializing in twentieth century U.S. history. She is the author of *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (2003), which was awarded the Ellis W. Hawley Prize in Political Histo-

ry/Political Economy from the Organization of American Historians and the Hagley Prize in Business History from the Business History Conference. She is co-author with Eileen Boris of *Caring For America*. Professor Klein has been a fellow of the Brookings Institution, the Robert Wood Johnson Foundation, and the National Endowment for the Humanities. A historian of twentieth century U.S. political economy, her research and teaching stand at the intersection of work and the welfare state. She has written numerous articles on the history of healthcare policy, Social Security, pensions, collective bargaining, New Deal liberalism, and homecare work and policy.

As the first scholars to write the history of homecare over the course of the twentieth century, *amici* submit this brief in the belief that the historical record illuminates the questions now under consideration by this Court.

SUMMARY OF ARGUMENT

Petitioners' argument in this case is premised on a basic misunderstanding of the history and evolution of homecare work. Petitioners and their *amici* portray homecare workers as good Samaritans who receive public benefits for tending to family members they would care for anyway even without compensation, rather than as a growing workforce that performs a service of central importance to the State; deny that Illinois is the employer of that State's homecare workers in any real respect; and contend that collective bargaining by home healthcare workers does not advance any substantial state or public interest. The history and current status of the homecare profession, however, belie each of these contentions. In fact, States historically have directed, supervised, and controlled the economic terms gov-

erning the provision of homecare and its increasingly skilled workforce in crucial ways—and continue to do so to this day. At the same time, the extension of collective bargaining rights to state homecare workers has provided vitally important benefits to States, to the beneficiaries of homecare services, and to homecare workers themselves.

A. Homecare workers provide essential services to elderly Americans, to those struggling with chronic illnesses, and to people with disabilities. Although the jobs of homecare workers vary widely, these employees often tend to tasks such as supervising medication, monitoring vital signs, dressing, bathing, cooking, and attending to client hygiene.

For much of American history, this type of care work was handled at the periphery of the economy. But, since the early part of the twentieth century, government at every level has become increasingly involved in organizing, regulating, and directly managing the job of homecare. These efforts began with modest programs that dispatched "substitute mothers" and "housekeeping aides" to needy homes. The government's role in homecare began during the New Deal, with President Roosevelt and other reformers viewing homecare work as both a vehicle for increasing employment and a workable alternative to institutionalization. During and after World War II, these workers became employees of public welfare and health departments in a number of jurisdictions. By the 1960s, all levels of American government—local, state, and federal—were intimately involved with the homecare labor force. These governments set wages and hours, provided training programs, determined who could be a compensated homecare

worker, dictated the tasks to be accomplished, and regulated how those tasks would be performed.

B. This history, together with an on-the-ground recognition of what care workers actually do on an everyday basis, makes it clear that the tasks performed by homecare workers are undoubtedly "work" of a sort that one would expect to see undertaken by employees of the State. Despite petitioners' facile suggestion to the contrary, the vast bulk of care workers do not incidentally receive government benefits for work they would otherwise do anyway. Rather, they hold jobs performed under government supervision in exchange for government wages. Indeed, the tasks carried out by state-compensated homecare workers are often identical to the tasks performed by care workers who are employed by private agencies, either in the home or in an institutional setting. Given the similarities between some kinds of nursing and homecare, it is no surprise that many care workers have moved along a continuum of jobs that has included nursing homes, hospitals, and various group homes. The "work" of homecare has now been recognized by the federal government, which recently acknowledged that consumers (as disability activists prefer designating the receivers of this labor) often jointly employ homecare workers with both public and private employers. The government further provided that such jointly-employed homecare workers are not exempt from the protections of the Fair Labor Standards Act.

In fact, homecare is an occupation—and one that is expanding rapidly. Homecare is among the fastest growing job fields in America. Some two-and-a-half million Americans are employed in homecare, a figure that is expected to double over the next decade.

Care work is a critical component of the modern healthcare system, providing both a cost-effective alternative to institutionalization and a framework for achieving a higher quality and quantity of healthcare for everyday Americans. In these circumstances, there is no basis for differentiating care workers who perform state-defined and compensated services in the home as joint employees of individual consumers and the State or a private agency, from those who perform such services for the same compensation in an institutional setting.

C. The development of homecare as a distinct occupation has not been accompanied by a corresponding increase in worker wages, job stability, or training. As a consequence, many modern homecare workers must deal with extraordinarily difficult circumstances both in their workplaces and in their own homes. Although they navigate intimate personal and medical situations on an everyday basis, many homecare workers have not received sufficient training. Others are paid poverty wages. Many homecare workers lack healthcare themselves, which is especially problematic given the dangers involved with some care work and the threat that a sick care provider poses to vulnerable consumers. Together, these problems have led to unsustainable rates of turnover among unrepresented homecare workers, which in turn has reduced the quality and dependability of care available to some consumers.

Care workers began organizing in earnest during the 1960s, when workers' frustration with low wages and poor working conditions reached intolerably high levels. Realizing that representation might improve their lives, many workers began exploring collective bargaining as a means of negotiating with their em-

ployers concerning training, stabilizing hours of work, wages and benefits, and coordination of placements. In some cases, homecare unions emerged as independent locals or as part of public sector organizing during the 1960s. In other instances, homecare workers sought out unions of hospital workers or nursing-home attendants, who perform identical or very similar tasks. Recognizing that permitting homecare workers to engage in collective bargaining with government officials about their employment terms could improve the quality and raise the standards of care, many States—including Illinois—have chosen to protect their own interests and those of individuals in need of homecare by extending to homecare workers the right to choose a representative and engage in collective bargaining.

On the whole, care workers' collective bargaining has helped achieve better outcomes for the workers, for homecare clients, and for the States as employers. Of particular importance for present purposes, the extension of the right to bargain collectively to homecare workers has facilitated labor peace, while encouraging development of a more stable and productive workforce that provides an increasing level of service for an aging population. That reality has ensured that millions of Americans have access to well-trained homecare employees.

ARGUMENT

To appreciate the current status and nature of the State's role as employer of homecare workers, it is helpful to begin with a look at the history and evolution of the home healthcare occupation. Government at all levels has been instrumental in creating that occupation, setting its standards, paying for its services, and supervising its performance—that is,

the essential things that an employer is expected to do. In fact, government policies played a direct role in "shap[ing] the structure of the industry and the terms of conditions of work" and continue to do so today. Eileen Boris & Jennifer Klein, *Organizing Home Care: Low-Waged Workers in the Welfare State*, 34 Pol. & Soc'y 81, 83 (2006). When homecare services are provided by workers who are paid by and substantially responsible to the State, collective bargaining with the State is a valuable means of setting critical terms of the employment relationship.

A. Homecare has long been closely supervised and managed by the state.

1. In one sense, care work has been part of the American economy since the Founding. Historically, the household was the locus of care for elderly and disabled Americans. State-run and private institutions, now thought to be major care providers for older citizens, originally focused on serving the severely ill, the disabled, and the kinless poor. Eileen Boris & Jennifer Klein, *Caring for America: Home Health Workers in the Shadow of the Welfare State* 20-21 (2012).

In the first decades of the twentieth century, however, private agencies, such as the Jewish and Catholic Family Services, began hiring homemakers to care for incapacitated mothers and their children. The conditions of these workers, though, remained largely outside the public eye. Maud Morlock, *Homemaker Services History & Bibliography* 1-4 (1964).

2. The nature of the occupation, if not the work actually performed, changed significantly with the advent of the New Deal and, subsequently, with the

expansion of state responsibility for medical and related services in the 1960s and 1970s. At those times, governments at all levels—federal, state, and local—began and then accelerated the development of a state-employed homecare workforce.

During the Great Depression, government began shaping the homecare labor market. In 1935, Congress funded the Works Progress Administration ("WPA") to employ people on projects that included health and social services. Nick Taylor, *American-Made: The Enduring Legacy of the WPA: When FDR Put the Nation to Work* (2008).

The WPA's involvement in the provision of homecare was extensive. The agency's "visiting housekeepers" program, for example, was designed to aid families with incapacitated mothers. This program was also a source of care for chronically ill and elderly people, enabling them to be returned from public hospitals to their homes and relieving the fiscal stress on public hospitals from having to house people with chronic conditions. Marta Fraenkel, *Housekeeping Service for Chronic Patients* (1942); The Hosp. Council of Greater N.Y., *Organized Home Medical Care in New York City: A Study of Nineteen Programs* 35-37 (1956). During the New Deal and the decades that followed, the federal government thus became directly involved with the most important details of homecare employment: who could provide care, who could receive it, how it would be provided, and what the providers would be paid. *Report on the First Year's Work of WPA Project*, Mary C. Jarrett Papers, Sophia Smith Collection, Smith College (Feb. 15, 1937); Div. of Women's & Prof'l Projects, Works Progress Admin., *Housekeeping Service for Home Care of Chronic Patients*, Report on Official

Project No. 165-97-7002 (Dec. 1938); Fraenkel, *Housekeeping for Chronic Patients*, *supra*.[1]

By the time the WPA was dissolved in 1943, the program had employed over 38,000 housekeeping aides in 45 States and the District of Columbia. Boris & Klein, *Caring for America*, *supra*, at 23.

3. With the assistance of federal funds, States also became deeply involved in the provision of homecare. The particular manner in which States chose to organize such care, however, differed in light of the varied ways in which these governments organized social welfare services and assistance.

One model often chosen by state and local government involved the public employment of care workers. Illinois offered an early example of such a regime. Just as the WPA created a "housekeeping-aide" program during the New Deal, the City of Chicago adopted a "homemaker" program through which recipients of state aid could receive home services. Boris & Klein, *Caring for America*, *supra*, at 49. Like their national counterparts, Chicago's homecare initiatives steadily expanded in the years following the Great Depression. By 1940, the City of Chicago Wel-

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[1] In an effort to reduce reliance on welfare programs, the federal government subsequently pursued policies that further expanded its involvement in homecare. Through the Office of Economic Opportunity and other federal programs, government at the federal and state levels helped train poor, single mothers to become homecare workers. These women, in turn, no longer needed to seek welfare benefits through Aid to Families with Dependent Children. U.S. Office of Econ. Opportunity, *A Nation Aroused: 1st Annual Report* 41 (1965), *microformed on* "The War on Poverty, 1964-1968," Part I: The White House Central Files, Reel 9, Box 125, University Publications of America.

fare Department provided homemakers for families on Aid to Dependent Children when mothers were incapacitated. Beginning in 1947, the Public Assistance Division of the Cook County Department of Welfare began to provide housekeeping services. That agency controlled homecare workers' wages and hours, as well as the amount and type of services that could be provided. Even with this extensive level of government involvement, some clients complained that lack of direct state supervision of workers was resulting in a reduction in service quality. Thus, in 1952, Cook County established a Homemaker Service Department within the Department of Welfare. This program provided field supervisors, maintained time schedules, centralized payroll data, and recruited homecare workers to become government employees. Div. of Pub. Health Methods, U.S. Dep't of Health, Educ. & Welfare, Pub. Health Serv. Publ'n No. 645, *Homemaker Services in the United States, 1958: Twelve Statements Describing Different Types of Homemaker Services* 10-15 (1958) ("*1958 Report*").

After World War II, responsibility for homecare programs shifted into state and local welfare departments. To carry out the service, Illinois joined a number of other States in using federal dollars to expand homecare service. Boris & Klein, *Caring for America*, *supra*, at 50. In 1951, Illinois submitted an application for funds under all the categorical aid programs of Social Security to pay for homecare services.[2] Cook County then developed training pro-

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[2] "Submittal for Commissioner's Consideration; Subject: Homemaker Service—Illinois and New York," Bureau of Public Assistance to the Deputy Commissioner, September

grams for the County's homecare workers. This training included practical work in household skills, home nursing, and care for the bedridden. Homemakers were full-time public employees and had their wages increased after a probationary period. They received reimbursement for transportation, vacation, sick leave, disability, and retirement benefits like all other Cook County Department of Welfare employees. These homecare workers were not only employees of the government, but were also members of public employee unions and engaged in collective bargaining. See Div. of Pub. Health Methods, U.S. Dep't of Health, Educ. & Welfare, Pub. Health Serv. Publ'n No. 746, *Homemaker Services in the United States: Report of the 1959 Conference* (1960); *1958 Report*, *supra*, at 10-15.

During this period, homecare workers were employees of the government and became members of public employee unions who engaged in collective bargaining. In New York, they were first represented by an independent union, the Social Service Employees Union, and then by the American Federation of State, County, and Municipal Employees ("AFSCME") in the 1960s. Boris & Klein, *Caring for America*, *supra*, at 81-82, 89-91. In Illinois, AFSCME represented homecare workers prior to 1980. See Russell K. Schutt, Organization in a Changing Environment: Unionization of Welfare Employees 90 (1986).

As the federal government offered the States new funding for old age, health, and disability services in the 1960s and 1970s, Illinois sought to meet an ex-

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12, 1952, CF 1949-52, box 412 (or 416), RG102, National Archives and Records Administration, College Park, MD.

panded demand by reorganizing the delivery of homecare. In 1979, Illinois established programs to pay for homecare through its general revenues. Using this mechanism, the State provided basic homecare services for the disabled through state employees characterized as "[h]omemaker[s]"; it also provided "[i]ndividual housekeepers" for persons over the age of 60. See *State of Ill., Dep't of Cent. Mgmt. Servs. & Dep't of Rehabilitation Servs.*, No. S-RC-115, 2 Pub. Emp. Rep. for Ill. ¶ 2007, 1985 WL 1144994 (Dec. 18, 1985).

In 1981, Congress agreed to let States use Medicaid funds more flexibly through federally approved waivers. In 1983, Illinois (like other States) applied for a Medicaid waiver, which would allow the State to adopt its own means of providing homecare service. Illinois used one waiver to provide homecare to the elderly through state contracts with vendors and another waiver to allow disabled persons to avoid institutionalization. Boris & Klein, *Caring for America*, *supra*, at 163.

In its current iteration, for reasons of efficacy and economy, Illinois has delegated some of its authority over homecare workers to consumers themselves, such that the individual recipient of care generally is entitled to select and terminate the homecare worker within state-defined limits, but the State sets the requirements for service, writes the employment contract, develops each consumer's service plan, and establishes and pays worker wages and benefits. See Ill. Admin. Code tit. 89, §§ 676.10-.200. Illinois moved to this model at least in part due to its experience in the 1980s, when the State had a long waiting list for people needing homecare but could not attract a reliable labor force; the instability

of worker schedules and hours made the homecare labor market chaotic. Boris & Klein, *Caring for America*, *supra*, at 162-163.

4. The state interest in supervising the activity of homecare workers, reflected in this history of homecare work in Illinois, has become increasingly urgent as homecare has assumed a greater role both in public health and in the economy as a whole—and as the status of home healthcare as a profession has solidified. There can be no dispute on these points: Homecare is now one of the fastest growing professions in America. Together, personal care aides and homecare aides are projected as the top two job growth categories from 2010-2020. See Bureau of Labor Statistics, Economic News Release tbl.5 (Dec. 19, 2013), http://tinyurl.com/no6zau5. Although there are already two-and-a-half million homecare workers in the United States, that number is expected to double by 2018. Eileen Boris & Jennifer Klein, *Home-Care Workers Aren't Just 'Companions'*, N.Y. Times, July 1, 2012. See also Michele Ochsner, Carrie Leana, & Eileen Applebaum, *Improving Direct Care Work: Integrating Theory, Research and Practice*, Alfred P. Sloan Foundation White Paper, at 4 (July 23, 2009) (noting that the Bureau of Labor Statistics "estimates that the demand for personal and home care aides will increase by 51% and that the demand for home health aides will increase by 49% between 2006 and 2016").

This trend is certain to continue as the U.S. population ages: "Approximately 1.2 million elderly and 300,000 younger chronically ill or disabled individuals live in the nation's 17,000 nursing homes, and nearly 900,000 elders reside in assisted living facilities." Ochsner et al., *supra*, at 3. Experts predict that

the number of older Americans in need of hired care workers will be well over five million by 2040—a two-fold increase from only 40 years earlier. *Id.* at 4. And it is more than the aging of the population that has increased homecare needs; after 1980, changes to Medicare and the transformation of the hospital industry sent people home sooner and with greater post-hospital care needs. Boris & Klein, *Caring for America*, *supra*, at 14.

Without the alternative of homecare, the American economy would be strained by the enormous cost of caring for a huge number of elderly or disabled persons in hospitals, nursing homes, or other institutions. Indeed, in 2006 alone, governments spent about twice as much on nursing-home care ($125 billion) as they did on homecare ($53 billion). Ochsner et al., *supra*, at 3. In these circumstances, it is critically important that the States not be deprived of the labor relations tools necessary to respond to local circumstances with the requisite flexibility.

B. Homecare workers perform work equivalent to that of other public and private sector healthcare employees under terms and limits set by the State.

1. This history of homecare's increasing development as a distinct occupation—and the consistent recognition of state governments that they are responsible for the continued availability of quality homecare—belies the assumption that seems to underlie much of petitioners' argument: that many homecare providers are best characterized as volunteers "caring for a disabled family member so that he or she may live at home" (Pet. Br. 38), rather than as members of a critically important and sophisticated government workforce. So long as providers receive

government pay and work under government supervision, the fact that their labor takes place in a home and can affect members of their own families does nothing to alter their employment status or transform their wages into "public benefits." On the contrary, the situation of modern home healthcare workers is fundamentally similar to that of other healthcare and public sector employees.

Viewing homecare as family service rather than regular employment requires discarding common understandings of what "work" and "employment" mean. In ordinary usage, "work" is "the labor, task, or duty that is one's accustomed means of livelihood," and an "employee" is "one employed by another usually for wages or salary." Merriam Webster's Collegiate Dictionary 408, 1442 (11th ed. 2003). These definitions highlight an intuitive truth—that persons earning their primary wages from providing care services perform "work" and are "employees" of the entity paying them, no matter where this labor takes place or what the workers' relationships to their consumers look like.

That homecare workers are paid to perform tasks that they or others might, in a different context, do for free is immaterial. Firefighting, for example, was once, and still often is, an uncompensated, volunteer-based community service. See *National Fire Protection Association (NFPA) Estimates*, U.S. Fire Admin. (2012), http://tinyurl.com/ngxpb8y (noting that about 70% of America's 1.1 million firefighters are volunteers). Yet no one would suggest that full-time professional firefighters are good Samaritans who incidentally receive a public assistance benefit, or that they are lobbying on a matter of public policy when they bargain for increased wages for doing their job.

Rather, they are employees performing paid work who seek compensation for that work from their employer. See, *e.g.*, *Ricci* v. *DeStefano*, 557 U.S. 557, 563 (2009) (characterizing the City of New Haven as the "employer" of municipal firefighters); *id.* at 608 (describing firefighting as a "profession").

Similarly, any suggestion that services traditionally performed in the home by family members cannot constitute work falls apart under scrutiny. Consider, for example, basic housekeeping services: if a family hired a housekeeping agency to provide the cleaning services that once fell to a mother or a wife, no one would doubt that these services constituted "work" and that the housekeeper is a bona fide "employee" of the agency, even if family members directed the housekeeper while he or she was in their home. Indeed, homecare workers employed by private agencies work in the homes of (and are supervised on a day-to-day basis by) the disabled people they serve, providing exactly the same types of services as the workers here; such workers have long been organized under the NLRA. See, *e.g.*, *Metrocare Home Servs., Inc.*, 332 NLRB 1570, 1570-71 (2000); *People Care, Inc.*, 299 NLRB 875, 875, 877 (1990); *Human Dev. Ass'n*, 293 NLRB 1228, 1228 (1989); *ANKH Servs., Inc.*, 243 NLRB 478-80 (1979); *Visiting Nurses Ass'n of Sacramento*, 187 NLRB 731, 731-32 (1971).

Moreover, the idea that homecare workers simply receive a state benefit for labor they would otherwise provide for free is wholly out of touch with the realities of modern homecare. Although some homecare workers do enter the field to care for family members, many of these individuals stay on to become career homecare aides, and their decisions to

remain in the workforce (rather than returning to other jobs) are influenced as much by compensation as by commitment to caring for families. Candace Howes, *Upgrading California's Home Care Workforce* 78 (2004). Homecare workers' labor-market behavior thus depends on a number of factors, including wages, benefits, job flexibility, and employment rights—and this is true for both relatives and non-relatives of consumers. Candace Howes, *Love, Money, or Flexibility: What Motivates People to Work in Consumer-Directed Home Care?*, 48 Gerontologist 46, 58 (2008). Without adequate compensation from the State, many homecare providers would not stay in this line of work, as studies have found a direct relationship between wage levels and worker retention and reduction of turnover rates. See Candace Howes, *Living Wages and Retention of Homecare Workers in San Francisco*, 44 Indus. Rel. 139, 140 (2005) ("Howes, *San Francisco*"). It is therefore clear that homecare workers respond to many of the same incentives as employees in other fields. The low wages and stigmatization of care work as intimate labor fuels a chaotic labor market that the State has an interest in regularizing and that workers have an interest in improving through collective bargaining.

2. The actual work performed by homecare employees reinforces their similarity to other public healthcare workers. Homecare aides often serve in roles that are functionally indistinguishable from those their counterparts play in hospitals, nursing homes, and other healthcare facilities. See Comm'n on Long-Term Care, *Report to Congress* 19 (2013) ("Home health aides perform tasks similar to those of nursing aides, but in the home and community."). The Bureau of Labor Statistics includes both those who work in the home and those who labor elsewhere

under the classification of personal attendants. Indeed, some workers do the same exact things in their day jobs at hospitals and their night jobs in private homecare. See, *e.g.*, The Fair Home Health Care Act: Hearing on H.R. 3582 Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Labor, 110th Cong. (2007) (statement of homecare worker Manuela Butler) (noting that, under the then-governing legal framework, homecare workers "would get time and half pay for [their] overtime hours for performing the same tasks for Mrs. G. if she was in a nursing home facility").

For this reason, homecare workers have long joined unions alongside hospital aides and other support workers who labor in hospitals, nursing homes, and group homes for the developmentally disabled. Starting in the 1970s, workers at both public and private hospitals and nursing homes sought to bring homecare employees into their unions, precisely because all of these workers perform identical or substantially similar tasks. See Boris & Klein, *Caring for America*, *supra*, at 124 (describing how "[h]ospital unions further discovered housekeeping and health aids doing the same tasks as their members during weekends or evenings, but in the private setting of the home, and they too began to organize such workers"). As services provided by certified nursing assistants and other personnel in institutional settings unquestionably constitute work, identical services performed by homecare workers in private homes should not be viewed any differently.

3. The importance of this work for the health and well-being of millions of Americans has given the homecare workforce a vital role in America's healthcare system. Without the services of millions

of homecare workers, many consumers would be forced into institutionalization, which is considerably more expensive and less desirable for most patients. See National Consumer Voice for Quality Long-Term Care, *Consumer Perspectives on Quality Home Care* 7-8, 16 (2012) ("Consumer Voice").

In recognition of the critical part that homecare workers play in the multitrillion dollar healthcare industry, States and the federal government have moved to expressly recognize that homecare employees are ordinary employees who deserve corresponding labor law protections even when jointly employed by consumers. In September 2013, the Department of Labor ("DOL") eliminated the decades-old exemption of many homecare workers jointly employed by consumers and a third-party such as a state agency under the Fair Labor Standards Act ("FLSA"). Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,453 (Oct. 1, 2013) ("Homecare Rule"). In its final Rule, DOL specifically noted that direct care workers are not mere "elder sitters" or companions. *Id.* at 60,455. Modern homecare work is not only "far more skilled and professional" than it once was, but it also often includes "medical care, such as managing the consumer's medications or performing tracheotomy care, that was previously almost exclusively provided in hospitals, nursing homes, or other institutional settings and by trained nurses." *Id.* at 60,458.

Of particular relevance here, the new Rule rejected an argument similar to the one promoted by the petitioners in this case—that homecare aides are "effectively employed" by their patients rather than by the entities that pay for and regulate their services. 78 Fed. Reg. 60,455. Indeed, DOL noted that

"[d]irect care workers and consumers explained that a variety of care arrangements have been developed in order to provide homecare, many involving potential joint employment relationships." *Id.* at 60,483. The Department explained that, under long-settled principles, "an individual who hires a direct care worker or live-in domestic service worker to provide services pursuant to a Medicaid-funded consumer directed program may be a joint employer with the state agency that administers the program." *Ibid.* And while explaining that both joint employers are responsible for complying with the FLSA in most instances, under the new rule only the state agency or other third-party joint employer carries the obligation of paying the minimum wage and required overtime compensation. *Ibid.*; 29 C.F.R. § 552.109(c).

The federal government's decision to recognize the employment status of homecare workers in this manner follows in the footsteps of a number of States and municipalities that have recognized homecare aides as public employees and, for this reason, have accorded them the right to engage in collective bargaining, just like other public employees. Between 1990 and today, nine states have recognized homecare workers' right to bargain over their wages and benefits. Resp. SEIU Br. 51 n.14. See also Dorie Seavey & Abby Marquand, PHI International, *Caring in America: A Comprehensive Analysis of the Nation's Fastest-Growing Jobs* 28-29 (2011) ("PHI"). In each of these situations, homecare workers were doing the same things in the home that had long been done in hospitals and nursing homes. And, in each of these cases, governments that controlled the economic terms of homecare workers' employment recognized that it served their interests to give homecare

workers the same collective bargaining rights as those accorded other public employees.

In sum, in light of homecare's new and central role in the healthcare market, States have recognized that, even while delegating some authority to consumers, they must retain the central authority of employers—setting and paying wages and benefits, determining hours, regulating procedures, dictating the substantive work done by homecare aides, and bargaining over employment terms—to ensure that critical homecare services are provided adequately.

C. The extension of collective bargaining rights to state-employed homecare workers affords substantial benefits to those workers, to homecare consumers, and to the States.

Extending collective bargaining rights to publicly employed homecare workers offers a rational way for States to respond to the dynamics of this burgeoning field. Collective bargaining helps combat many of the problems posed by homecare, while also encouraging the further professionalization of the workforce.

1. The development of homecare—and the increasing importance of homecare to the economy—has not been accompanied by a corresponding increase in worker wages, benefits, stability, or training. See Homecare Rule, 78 Fed. Reg. 60,458. Instead, the industry has been characterized by low pay, high turnover, frequent workplace injuries, and a lack of formalized standards or training programs. See Nari Rhee & Carol Zabin, *The Social Benefits of Unionization in the Long-Term Care Sector*, in Academics on Employee Free Choice: Multidisciplinary Approaches to Labor Law Reform 83, 84 (John Logan

ed., 2009). This reality contributes to a shortage of homecare workers that will only grow worse as the population ages. See Inst. of Med., *Retooling for an Aging America: Building the Health Care Workforce* 5 (2008).

Many homecare workers in America are at the vulnerable intersection of racial, gender, and socioeconomic disadvantage. On the whole, these workers are disproportionately women of color: Around 90% are women; 50% are African-American; 25% are Hispanic. Eileen Appelbaum & Carrie Leana, *Improving Job Quality: Direct Care Workers in the U.S.*, at 1 tbl.1 (2011). "Compared to other direct care workers in hospitals and nursing homes, they are more likely to be foreign born, Hispanic, Latina, or Asian, and non citizen today than forty years ago when African Americans dominated the job." Boris & Klein, *Caring for America*, *supra*, at 4.

Historically, these workers have been paid very low wages, and conditions have not uniformly improved in the intervening decades. "In 2005, the median hourly wage for direct care workers was $9.56 as compared to a median hourly wage of $14.15 for all U.S workers." Ochsner et al., *supra*, at 4.[3] As of 2006, one-quarter of homecare workers had annual family incomes below $10,000, and one-third of homecare workers lived below the poverty line. Boris & Klein, *Organizing Home Care*, *supra*, at 82. These vulnerable workers historically not only have labored for poverty wages, but have also lacked any employ-

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[3] In 2005, nursing home aides made approximately $22,000 per year, home health aides made approximately $19,500 per year, and homecare aides made approximately $17,700 per year. Ochsner et al., *supra*, at 4.

ment security or fringe benefits. Boris & Klein, *Caring for America*, *supra*, at 6.

On the whole, homecare workers receive wages well below the national average, are more likely to live in poverty and lack health insurance than are other workers, and experience high levels of workplace injury. Inst. of Med., *supra*, at 200-201. Many are also poorly trained. *Id.* at 214-215. Indeed, consumers cite additional training as one of the principal requests for homecare employees. Consumer Voice, *supra*, at 21.

2. These characteristics of homecare employment have led the industry to experience shockingly high levels of turnover, which according to some estimates may run in excess of 70% per year. Rhee & Zabin, *supra*, at 84. Retention of new employees is correspondingly dismal. One study found that 40% to 60% of homecare workers leave after a single year on the job, and 80% to 90% leave after two years. *Id.* at 84-85. This constant state of flux creates a major impediment to the effective delivery of care. When turnover is high, the chances that a consumer will be injured increase, as new workers may be poorly trained, less familiar with the customer's needs and home, and more likely to act negligently. See Eileen Boris & Jennifer Klein, *We Were the Invisible Workforce: Unionizing Horne Care*, *in* The Sex of Class: Women and America's New Labor Movement 177 (Sue Cobble ed., 2007). Accordingly, studies have found a direct association between high turnover rates and low quality of care. See Inst. of Med., *supra*, at 213.

3. Poor conditions and a decentralized workforce have also produced a history of fractious labor relations, characterized both by workers protesting their

treatment and by disputes between unions seeking to represent these employees.

In New York, for example, some 12,000 homecare workers went on strike in 2004. Steven Greenhouse, *Thousands of Home Aides Begin a Strike*, N.Y. Times, June 8, 2004. The workers demanded an increase in their extremely low wages, which were then set at about $7 per hour. Jennifer Steinhauer, *Labor Demands Cast a Rich Mayor in a Miserly Light*, N.Y. Times, June 10, 2004.

Three years later, another group of homecare workers went on strike in New York, protesting their uniform lack of health insurance and their low wages (which were then set at below $8 per hour). These workers demanded a new contract, hoping to win wages that were on par with other state employees who were represented. Caroline E. Ruse, *Home Health Care Workers Strike*, Newsday, Aug. 14, 2007. Many striking homecare workers reported that, without a collective bargaining agreement, they had no way of enforcing promises that had been made to them by their employer when they were hired. Luann Dallojacono, *Aides Demand Contracts*, The Long Islander, Aug. 16, 2007 (noting that Premier Healthcare promised various benefits to new hires but never followed through).

This same kind of contention existed in other States. See, *e.g.*, Boris & Klein, *Caring for America*, *supra*, at 164-175 (describing protests in Illinois). And this unrest is not an artifact of history: Major labor unrest is *currently* occurring in Ontario, where more than 4,500 homecare workers are on strike. See, *e.g.*, Hillary Caton, *Personal Support Workers Across Ontario on Strike*, Burlington Post, Dec. 10, 2013.

These strikes hit homecare *consumers* especially hard, as they may lose all access to healthcare during labor strife. Even when replacement workers can be located, those workers often stay with the client for less time and provide less satisfying or competent care than did the striking employee. See, *e.g.*, Dallojacono, *supra*, at A14 (discussing consumer complaints stemming from labor unrest in New York in 2007 that "replacement workers will [not] give the same standard of care"). During the 2007 New York strike, for example, the recipients of homecare service received either no care or lower-quality care during the strike, and replacement workers made mistakes that endangered the health of the patients. Caroline E. Ruse, *Amid Premier Strike, Patients Suffer*, Newsday, Aug. 18, 2007. Such disruptions also burden the State, which may be forced to make expensive alternative care arrangements—possibly including institutionalization—in response to labor disruption.

Disputes between workers and their state employer have not been the only source of confusion and contention in this context: unions have competed to represent homecare workers. In New York in the late 1970s and 1980s, AFSCME, Local 1199 Hospital, Nursing Home, and Allied Health Services Union, and SEIU competed against each other. In California throughout the 1990s, United Domestic Workers of America, AFSCME, and SEIU sought to represent the same workers. In the first decade of the twenty-first century, AFSCME and SEIU competed against each other in Michigan, while the Communications Workers of America (CWA) joined the competition in New Jersey. See, *e.g.*, J.A. 26 ¶ 32 (competition between two unions to represent Illinois homecare workers); Alicia Freese, *Formerly Allies, Two Unions*

Now Compete for Home-care Worker Votes, VT Digger, May 30, 2013; Rob Mitchell, *National Unions in Tussle To Represent Home Care Workers*, Rutland Herald, June 25, 2013. Disputes of this kind pose the danger of disruptive "conflicting demands from different unions" or "attack[s] [on labor agreements] from rival labor organizations" that may be avoided by exclusive collective bargaining representation. *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 220-221 (1977).

2. Collective bargaining has proven to be one of the most effective ways of addressing these problems in the chaotic homecare market: it has improved homecare workers' wages, benefits, training, and job stability; avoided work stoppages and the confusion caused by inter-union disputes; and accordingly enhanced the quality of patient care.

First, collective bargaining has dramatically increased homecare workers' compensation and improved their quality of life. See Boris & Klein, *Organizing Home Care*, *supra*, at 81 (documenting improved compensation attributable to collective bargaining in California and Oregon). Collective bargaining also has led to a significant expansion in health coverage and other benefits for homecare workers. Before California passed legislation that enabled collective bargaining, almost no homecare workers in that State had health benefits; now a majority of them do. Rhee & Zabin, *supra*, at 88. Similarly, homecare workers in Washington State and Oregon have secured significant increases in benefits through selecting a single representative and subsequent collective bargaining. *Id.* at 88-89.

Second, the gains from collective bargaining have not been confined to homecare workers themselves.

Rather, the rationalization of the homecare labor market through collective bargaining creates a more efficient and reliable care-provision model for consumers and a less contentious negotiating environment for States.

In particular, wage and benefits improvements embodied in collective bargaining agreements have helped combat the industry's major problems with turnover and retention. In her landmark study of the San Francisco homecare market, economist Candace Howes found that improvements in compensation resulting from collective bargaining between 1996 and 2002 led to a dramatic 89 percent improvement in retention. Howes, *San Francisco*, *supra*, at 140. Similar results have also been observed in other States. Rhee & Zabin, *supra*, at 87. In addition, bargaining has been an important catalyst in securing better training for homecare workers, which has reduced medical costs and the number of mistakes. Better training also has improved worker retention, as dissatisfaction with training is a major cause of worker attrition. *Id.* at 83-84.

Finally, in a regime of collective bargaining, the parties will work to secure a contract on terms that satisfy both workers and the public. See Rhee & Zabin, *supra*, at 87 (observing that homecare workers in union states have typically been able to negotiate contracts that improve wages, standards, and quality of service within a year). This helps ensure that employees will be satisfied with their working conditions, which in turn results in fewer labor stoppages. See Eileen Boris & Jennifer Klein, *Labor on the Home Front: Unionizing Home-Based Care Workers*, 17 New Lab. F. 32 (2008) (noting that representation improves workplace stability and helps to

avoid turmoil and work stoppages). Moreover, the existence of a union provides an avenue for workers to grieve complaints with management, allowing issues to be resolved instead of festering until workers quit or engage in disruptive protests such as strikes. Without such an intermediary, the process of resolving grievances is hopelessly disorganized and disaggregated.

In general, then, the extension of collective bargaining rights to homecare workers has helped provide stable and competent care to millions of Americans, which in turn has prevented States from having to shoulder the costs of these consumers' institutionalization. It has offered an effective way for States to make a chaotic, and increasingly crucial, market more rational. Moreover, in each of these places, the mechanics and limits of collective bargaining have been tailored to conform with how States have chosen to serve their elderly and disabled populations.

3. The Illinois experience itself shows how extending collective bargaining rights to state-employed homecare workers is a workable way to advance all of these interests. Under the current regime, Illinois has adopted a rational labor relations policy that has reduced costs, promoted labor peace, and increased the quality and quantity of care provided. Collective bargaining in Illinois has led to health benefits, paid training, paid orientations, a dispute resolution procedure, a health and safety committee, and other changes to make work within the program more attractive. Resp. Ill. Br. 7; Resp. SEIU Br. 6-7. Studies predict that these new measures will reduce workforce turnover by 33 percent. See Elizabeth T. Powers & Nicholas J. Powers,

Should Government Subsidize Caregiver Wages? Some Evidence on Worker Turnover and the Cost of Long-Term Care, 21 J. Disability Pol'y Stud. 195, 202 (2011).

Illinois's approach thus reflects its considered judgment that offering its state-employed homecare workforce the right to bargain collectively is the best way to handle this increasingly important area of state services. This Court should hesitate to strike down such a successful regime. See *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (States may "try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. * * * But, in the exercise of this high power, [it] must be ever on our guard, lest [it] erect [its] prejudices into legal principles.").

CONCLUSION

The judgment for the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-681

IN THE
Supreme Court of the United States

PAMELA HARRIS, et al.,
Petitioners,
v.

PAT QUINN, GOVERNOR OF ILLINOIS, *et. al,*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ILLINOIS POLICY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Illinois Policy Institute is a nonpartisan, non-profit public-policy research and education organization that promotes personal and economic freedom in Illinois, funded by the voluntary contributions of its supporters. The Institute's work focuses on six key policy areas: budget and tax policy, labor policy, health-care policy, education policy, good government, and jobs and economic growth. Through its affiliated public-interest litigation center, the Liberty Justice Center, the Institute seeks to protect Illinoisans' constitutional rights, focusing especially on First Amendment and economic-liberty rights.

This case concerns the Institute because it affects Illinois citizens' freedom of association and freedom of speech and because the challenged exclusive-representation scheme threatens to distort the marketplace of ideas in Illinois to benefit viewpoints that State officials favor.

SUMMARY OF ARGUMENT

This Court has held that the First Amendment forbids the State from forcing an individual to support union political speech to which he or she is opposed. It has also held that any risk that a dissenting worker's funds will be used for union

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[1] In accordance with Rule 37.3, all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel for the amicus affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than the amicus, its members, or its counsel made a monetary contribution to its preparation or submission.

political speech – for any length of time, in any amount – must be minimized. The exclusive-representation scheme Illinois has imposed on home care providers violates both of these principles.

Because the providers are not State employees, the union's speech to the State on their behalf can only be political – so requiring them to pay even an agency fee will violate their First Amendment rights. Moreover, even if some union speech on providers' behalf were comparable to union negotiations on behalf of true state employees, providers would still lack sufficient protection against the union using their fees for impermissible political activities. Unions have little difficulty hiding political spending amid their "representation" expenses, and nonmembers have great difficulty holding a union accountable for it. This creates an unreasonable risk that union members' First Amendment rights will be violated. The way to eliminate that risk is to allow providers to opt out of paying all union fees.

Illinois' scheme gives providers little choice but to surrender their First Amendment rights. Many have come to depend on the State's Medicaid-waiver program to provide constant home-care to a family member who would otherwise be institutionalized; now they have been told that they must either fund speech they oppose or leave the program. Providers thus have no reasonable means of preserving their rights short of moving to another state that does not force them to make that choice. Even if a majority of providers wanted out of the union, the nature of their work, which does not occur in a traditional workplace, combined with government-imposed

barriers, would make decertifying the union an unrealistic option. Thus, the providers' First Amendment injury is especially severe because it will continue constantly and indefinitely.

Finally, the scheme threatens the First Amendment interests of all Illinois citizens because it distorts the marketplace of ideas in favor of those advocated by State officials and the entities they recognize as exclusive representatives. The First Amendment, which is premised on a mistrust of government and the belief that a multitude of competing voices is best, is incompatible with a scheme under which officeholders can recognize exclusive representatives to speak for groups of citizens and force dissenters to pay for it. The manner in which this scheme came about and Illinois' well-known history of political corruption illustrate the folly of trusting officeholders not to use that power to tilt the political playing field.

ARGUMENT

I. Forcing home care providers to pay fees to SEIU means forcing them to pay for political speech.

Providers in Illinois' Rehabilitation Program who are compelled to pay fees to SEIU will be forced to pay for political speech with which they disagree – not only because the union's so-called collective-bargaining activities consist entirely of quintessential political speech, but also because the union's broad notion of what expenses are chargeable against nonmembers will likely result in providers'

money being spent on political activism that is far removed from representational activities.

Even in traditional public employment, a public-sector union engages in political speech when it provides the representation that nonmembers are forced to pay for; as the Court has noted, a union inevitably "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2289 (2012). That compelled political speech "imposes a significant impingement on First Amendment rights," but the Court has so far tolerated that infringement in the "anomal[ous]" context of the workplace because of the government's interest in maintaining "labor peace." *Id.* at 2289-90 (internal quotation marks omitted).

Here, however, Petitioners have shown that the "negotiations" with the State that providers are forced to support constitute political speech and that the "labor peace" interest does not apply to their work. Pet. Br. at 24-31, 39-42. By its nature, the SEIU's speech on providers' behalf can only concern the operation of a government program, particularly the money the government will spend on that program – a matter of public concern on which the union, nonmember providers, taxpayers, and other citizens may have a wide range of views.

Moreover, even if some of the union's lobbying on providers' behalf about the programs from which they receive subsidies were analogous to bargaining on behalf of public employees and justified by some compelling governmental interest, providers would still face the unreasonable risk – indeed, the near-

certainty – that some of their funds will be used to support political speech that is outside the scope of any legitimate representation.

To be sure, providers can opt out of paying for the union's political activities. *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36 (1977). Many do opt out; in fact, Respondent SEIU Healthcare Illinois & Indiana, which represents providers in the Rehabilitation Program and other home care providers, has an unusually high opt-out rate. Of 93,276 individuals in the union local, some 37,351, or 40 percent, have chosen to pay only mandatory agency fees. Paul Kersey, *Thousands of Workers Opted Out of Illinois' Largest Union in 2012-2013*, Illinois Policy Institute, Nov. 26, 2013, http://illinoispolicy.org/thousands-of-workers-opted-out-of-illinois-largest-union-in-2012-2013/. In contrast, the other union locals among the 50 largest in Illinois have an average opt-out rate of just 1.3 percent. *Id.* This suggests an extraordinary lack of support for the SEIU local's speech among the people who have been forced to support it.

In any event, opting out does little to ensure that nonmembers will not be forced to pay for any political speech. As the Court observed in *Knox*, auditors typically do not question unions' determinations of which expenses are chargeable to nonmembers – so if a union says political expenditures are chargeable, its auditors will take the union's word for it and classify them as chargeable. 132 S. Ct. at 2294. And although nonmembers "may . . . contest the union's chargeability determinations, . . . the onus is on

[them] to come up with the resources to mount a legal challenge in a timely fashion. This is . . . a significant burden for employees to bear simply to avoid having their money taken for speech with which they disagree . . . ." *Id.* (internal footnote and citations omitted).

Indeed, it strains credulity to believe, and it is unreasonable to expect, that participants in the Rehabilitation and Disability Programs would spend whatever free time they can find making sure that the union is spending their fees properly. Doing so would require them to review the union's report of its expenditures, determine whether each of the many expenditures is proper, and then, if they believe certain expenditures are improper, take the steps required to challenge them – which could include filing an unfair-labor-practice charge, participating in a hearing on the charge, and, if necessary, pursuing appeals before an Administrative Law Judge and then a court – all to challenge a fraction of fees they pay. See Ill. Admin. Code tit. 80 §§ 1200.135, 1220.10 *et seq.* Even for one who highly values First Amendment rights, the effort would make little economic sense. In some instances, public-interest organizations may help nonmembers vindicate their rights, as Petitioners' counsel of record has in this case, but it is not possible, nor should it be necessary, for those organizations to identify and correct all such First Amendment violations.

If a provider in the Rehabilitation Program did take time to review the LM-2 form that Respondent SEIU HealthCare Illinois & Indiana filed with the U.S. Department of Labor for 2012,[2] he or she would find that the union's expenditures for purported representational activities included, among many others, contributions to "Action Now," "Home Care First, Inc.," and "Missourians Organizing for Reform and Empowerment" ("MORE") – groups whose activities have respectively consisted of running "issue campaigns,"[3] funding a 2012 Michigan ballot initiative campaign,[4] and waging campaigns in Missouri against "an economic system that prioritizes corporations above all else."[5] Of course, this case does not present the question of whether those expenditures were somehow proper despite this Court's longstanding disapproval of a union using nonmembers' fees for "expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Abood*, 431 U.S. at 235-36; *see also Knox*, 132 S. Ct. at 2294-95 (union fee for "lobbying the electorate" regarding ballot-issue campaign violated

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[2] U.S. Dep't of Labor Form LM-2 for Service Employees Healthcare IL IN, schedule 15 (2012), available at http://illinoispolicy.org/wp-content/uploads/2013/11/SEIUHII2012LM2.pdf.

[3] Action Now Campaigns, http://www.actionnow.org/campaigns.

[4] Tim Martin, *Proposal 4: SEIU Union Pumps Money Into Michigan's Home Health Ballot Measure*, MLive.com, Oct. 26, 2012, http://www.mlive.com/politics/index.ssf/2012/10/proposal_4_seiu_union_pumps_mo.html.

[5] Our Work – Missourians Organizing for Reform and Empowerment (MORE), http://www.organizemo.org/our_work.

nonmembers' First Amendment rights). The problem is that such expenditures are not likely to ever become an issue before any court because the costs to objecting nonmembers of challenging them are prohibitively high.

This Court has held that the First Amendment cannot tolerate forcing individuals to pay for political or ideological speech with which they disagree, no matter how small the amount or how temporarily the funds are held. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986) (dissenters' funds may not be misused even temporarily and "[t]he amount at stake for each individual dissenter does not diminish this concern"); *cf. Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality opinion) ("[T]he inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason."). But tolerate it the Petitioners must if Respondents' position prevails.

In light of the Court's acknowledgment in *Knox* that unions can easily use nonmembers' fees for political speech – and in light of the First Amendment's requirement that no one should be forced to pay for political speech he opposes – there can be no justification for making dissenting providers pay union fees. Here, as in *Knox*, the "general rule" that "individuals should not be compelled to subsidize private groups or private speech . . . should prevail." 132 S. Ct. at 2295. Here, as in *Knox*, if one side's interests must be

subordinated to the other's, it should be "the side whose constitutional rights are not at stake." *Id.* Here, if not in all public employment, the best way to "minimize the risk that nonunion employees' contributions might be used for impermissible purposes," *Hudson*, 475 U.S. at 309, is to allow nonmembers to opt out of paying union fees entirely.

II. The State has given providers little choice but to pay for political speech they do not wish to support.

The State has placed home care providers in an untenable situation. It has led them to depend on a program that allows them to take care of their severely disabled family members at home rather than see them institutionalized, and then it has told them that they may only continue to receive this benefit if they pay for union speech with which they disagree. Petitioners have characterized the State's actions as "odious," Pet. Br. 38; they might also be called extortionate. And it is not merely a discrete act of extortion, as an officeholder's demand for a campaign contribution in exchange for an official act might be, but one to which they must submit constantly and in perpetuity. Because providers cannot reasonably be expected to value their First Amendment interests over the care of a family member, they have no reasonable hope of avoiding a violation of their rights short of leaving Illinois for a state that does not make this demand upon providers in Medicaid-waiver programs.

The only other conceivable way out is for providers to decertify the union – but that is not a realistic option. Decertifying a union is notoriously difficult,

even when the union lacks majority support. Probably few who are forced to pay union fees even know of their right to decertify; neither the union nor, especially in this case, the State has any incentive to inform them. *See* Douglas Ray, *Industrial Stability and Decertification Under the National Labor Relations Act*, 1984 Ariz. St. L.J. 257, 263-65 (1984); William A. Krupman & Gregory I. Rasin, *Decertification: Removing the Shroud*, 30 Labor L.J. 231, 233 (1979); *N.L.R.B. v. Drives, Inc.*, 440 F.2d 354, 367 (7th Cir. 1971) (Stevens, J.) ("[W]e wonder how many employees are aware of the existence of this seldom invoked right.").

For individuals who do learn of their right to decertify, the procedure may at first seem simple enough: One must get signatures from 30 percent of a bargaining unit's members, and the state Labor Relations Board will then hold an election. Ill. Admin. Code tit. 80 § 1210.60. But, in fact, it is not that simple because, where the "employer" has voluntarily recognized the union, as the State did for SEIU in this case,[6] a decertification petition may generally only be filed during the 30-day period

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[6] Indeed, Rehabilitation Providers never had an opportunity to vote on whether to join the union. Instead, according to the Illinois Department of Human Services, the union was recognized as a result of the State's determination in March 2003 that a majority of providers wanted to be represented by SEIU, based on the number of providers who, according to payroll records, were already SEIU members and the number of signed membership cards submitted by SEIU. Letter from Benno Weisberg, Illinois Dep't of Cent. Mgmt. Servs., to Justin Hegy, Illinois Policy Institute (Nov. 21, 2013), available at http://illinoispolicy.org/wp-content/uploads/2013/11/Weisberg Letter.pdf.

between 90 and 60 days before a collective-bargaining agreement's expiration or 60 to 90 days before five years will have elapsed, whichever comes first. Ill. Admin. Code tit. 80 § 1210.35. Thus, for example, because Rehabilitation Providers' previous collective-bargaining agreement was in effect from January 1, 2008 through June 30, 2012, J.A. 57, the providers had no opportunity to decertify for nearly four and a half years – and then they only had 30 days.

But this still understates the difficulty providers would face if they sought to decertify the SEIU as their exclusive representative. Communicating with other workers, collecting petition signatures, and conducting a decertification election campaign are costly activities, and for home-care providers, the costs may be especially high. As one pro-union legal scholar has observed, home care providers' jobs "seem completely antithetical to any notion of collective action" because would-be organizers cannot simply "stand at the factory gate and both identify and recruit workers as they enter[] and depart[]" as they can with industrial workers. Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1399 (2008). Providers are "hidden in individual homes [and] fragmented throughout neighborhoods, towns, and cities. Instead of working together in central locations, home-based care workers most commonly work alone in private homes." *Id.* (internal footnote omitted). So a would-be decertification petitioner must bear the unusual costs of finding and communicating with his or her fellow providers – if that is even possible.

The SEIU has been able to overcome this problem not only because of its superior financial resources but also because the State apparently gave SEIU the names and addresses of the providers it wanted to unionize.[7] Whether providers or third parties who wanted to undertake a decertification campaign could also acquire that information is uncertain; the Illinois Department of Human Services has recently declared that it cannot disclose providers' information under the Illinois Freedom of Information Act because doing so would violate the privacy rights of people who receive care in their homes. E-mail from Agostino Lorenzini, Illinois Dep't of Human Servs., to Justin Hegy, Illinois Policy Institute (Oct. 30, 2013), available at http://illinoispolicy.org/wp-content/uploads/2013/11/LorenziniEmail.pdf.

Thus, to escape infringement of their associational and speech rights, Petitioners must overcome a series of difficult, if not impossible, obstacles – all while competing against a union with vast resources and the State's support. Under the First Amendment, they should not have to escape at all; they should not be forced to fund the political speech of an organization they do not wish to support in the first place.

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[7] EO 2009-15 directed the Illinois Department of Human Services to "provide to an organization interested in representing individual providers access to the names and addresses of current individual providers." Pet. App. 50a. The record does not indicate how SEIU received Rehabilitation Providers' information in 2003, but the State is the only apparent possible source.

III. Allowing the State to compel funding for speech by select organizations will distort the marketplace of political ideas.

"The First Amendment creates a forum in which all may seek, without hindrance *or aid* from the State, to move public opinion and achieve their political goals." *Knox*, 132 S. Ct. at 2295 (emphasis added). That "forum" cannot exist if the State can compel subsidy recipients such as Petitioners to pay for unions' lobbying and other political speech. This compelled support harms the First Amendment interests of both dissenting subsidy recipients and the general public by distorting the marketplace of ideas in favor of views advanced by the entities that the State recognizes as exclusive representatives. Unlike other citizens and groups in Illinois, the exclusive representative has the power to force people who disagree with it to help pay for its political speech. Through their power to recognize exclusive representatives, officials can use state funds to indirectly aid the advancement of ideas that they favor and crowd out competing ideas.

And there is no reason to believe that this distortion would be limited to relatively narrow issues affecting home care providers or other subsidy recipients the State chooses to unionize, though that is offensive enough. By forcing subsidy recipients to pay fees to a union, the State also gives the union more funds to achieve its broader political goals, which may include reelecting the State officials who facilitated the unionization and supporting their policies. As discussed above, the burden placed on unionized workers to opt out of political funding and

unions' tendency to take a broad view of what constitute representation expenses leave little doubt that people who do not agree with the union's political speech will end up being made to pay for it. If the scheme is upheld and State officials begin appointing representatives for other groups that receive subsidies, it would put incumbent officials in a position to "tip[] the electoral process in [their] favor" and undermine the "competition in ideas and governmental policies [that] is at the core of our electoral process." *Elrod*, 427 U.S. at 357 (internal marks omitted).

The origins of the executive orders and statute at issue in this case suggest that State officials are well aware of the political opportunities this new tool offers them. Petitioners have alleged that Governors Blagojevich and Quinn issued their respective orders to unionize home care providers "in exchange for [SEIU's] political support and campaign contributions." J.A. 21-22, 26. Whether there was an actual quid pro quo agreement or not, it is certain that the executive orders benefited a top political supporter of both governors. In fact, SEIU was the second largest contributor to Blagojevich's 2002 campaign, giving $821,294, or 3.3 percent of all contributions.[8] Less than two months after taking office, Blagojevich issued the executive order authorizing an exclusive representative for Rehabilitation Providers, and the State recognized SEIU as the Rehabilitation Providers' representative

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[8] Contributions to Rod Blagojevich for 2002 Election, http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=3756.

– without giving providers an opportunity to vote on whether to join.[9] In the 2006 election for governor, SEIU was the top contributor to Blagojevich's reelection campaign by a wide margin, giving $908,382, or nearly five percent of the total.[10] In 2009, after Blagojevich's removal from office, Quinn issued the executive order authorizing an exclusive representative for providers in the Disabilities Program. EO 2009-15, Pet App. 48a-51a. SEIU Healthcare Illinois & Indiana, the exclusive representative for Rehabilitation Providers, then became the second-largest donor to Quinn's 2010 election campaign, with contributions of over $1.86 million, or 7.75 percent of the total. Considered together, SEIU-affiliated groups were by far Quinn's largest contributor, giving a total of at least $4.3 million, or approximately 18 percent of all contributions – much more than he received from, for example, all Democratic Party committees combined.[11]

If the governors issued their executive orders in exchange for SEIU's contributions as Petitioners allege, SEIU's investment paid off. Petitioners' complaint filed in 2010 alleges that providers in the Rehabilitation Program pay SEIU more than $3.6 million per year, J.A. 25; public records indicate, however, that from 2009 through 2013, the actual

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[9] See above, page 10 n.6.

[10] Contributions to Rod Blagojevich for 2006 Election, http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=79667.

[11] Contributions to Pat Quinn for 2010 Election, http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=116445.

annual amount has averaged about $10.4 million in representation fees, plus about $298,285 per year in fees for SEIU's political action committee. E-mail from Agostino Lorenzini, Illinois Dep't of Human Servs., to Justin Hegy, Illinois Policy Institute (Oct. 9, 2013), available at http://illinoispolicy.org/wp-content/uploads/2013/11/LorenziniEmail2.pdf. And a union stands to receive millions more if it succeeds in another attempt to unionize Disability Providers.

Illinois' experience illustrates how the power to compel union support can facilitate a cycle in which a union gives money to political officials; the officials force (or attempt to force) subsidy recipients to give money to the union; and the union, with the benefit of the additional funds, makes more contributions to public officials with the expectation that they will deliver more new dues payers.

Illinoisans in particular have other good reasons to be troubled by the prospect of government officials empowered to coerce contributions for political speech. Their state's history does inspire confidence that officials would show restraint or respect for First Amendment values in exercising that power. For example, their previous governor, Blagojevich, was impeached, removed from office, and sent to federal prison for, among other things, attempting to obtain campaign contributions in exchange for official acts,[12] and his predecessor, George Ryan,

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[12] Illinois General Assembly, Senate Impeachment Tribunal Documents, http://www.ilga.gov/senate/ImpeachDocuments.asp; Bob Secter & Jeff Coen, *Blagojevich Convicted*, Chicago Trib., June 27, 2011, http://articles.chicagotribune.com/2011-06-

went to federal prison for, among other things, issuing state licenses in exchange for political contributions.[13]

Of course, past abuses by former officeholders do not prove that current or future Illinois officials will repeat them. But Illinois history does provide a reminder of why the framers were wise to create a First Amendment premised on a "mistrust of government," *Citizens United v. FEC*, 558 U.S. 310, 340 (2010), that prohibits the state from compelling an individual to support an ideological or political cause he or she opposes, *Abood*, 431 U.S. at 234-36. And it shows why it would be unwise to subordinate citizens' First Amendment rights to Illinois officials' assertion that they have a compelling interest in designating exclusive representatives to speak for groups of citizens on matters of public concern at those citizens' compelled expense.

CONCLUSION

For the reasons set forth above and in the Petitioners' brief, the Seventh Circuit's judgment should be reversed.

27/news/ct-met-blagojevich-verdict-06-20110627_1_political-corruption-crime-spree-abraham-lincoln-roll-jury-convicts.

[13] *See* Claire Suddath, *A Brief History of Illinois Corruption*, Time, Dec. 11, 2008, http://content.time.com/time/nation/article/0,8599,1865681,00.html.

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AMICUS CURIAE BRIEF

No. 11-681

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PAMELA HARRIS *et al.*,

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether Illinois may require personal assistants working under the auspices of the State's Rehabilitation Program to pay their share of the representation costs incurred by a union selected on a majority basis by the personal assistants themselves to serve as their exclusive bargaining representative?

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INTEREST OF AMICUS CURIAE[1]

Amici curiae are the law professors and scholars listed in Appendix A. *Amici* teach, research, and write about labor relations and labor law, and have expertise in the issues before the Court in this case. The interests of *Amici* are to maintain the integrity of the law regarding the application of the First Amendment to the public sector workforce, and to aid the Court by contextualizing the important role of labor unions in the public sector.

A list of signatories can be found in Appendix A. Institutional affiliations are provided for identification purposes only.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters evidencing the parties' consent to the filing of *amicus* briefs are on file with the clerk.

SUMMARY OF ARGUMENT

Distinct from their roles as sovereigns, state, local, and federal governments act as managers of large public workforces that carry out vital public functions. Governments have adopted a range of strategies for meeting the inevitable management challenges that arise, and this Court has "often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist v. Or. Dep't. of Agric.*, 553 U.S. 591, 599 (2008).

Like many other public sector employers, Illinois has reasonably decided to manage its workforce of public assistants in part by allowing workers to select, on a majority basis, a union as their collective bargaining representative. The selected union is then required to fairly represent all members of the bargaining unit as their exclusive representative. In turn, members pay a service fee that covers their share of costs that are germane to the union's representation. These interlocking features—selection of a bargaining representative by a majority, exclusive representation, the duty of fair representation, and the service fee—are important aspects of a time-tested model of public sector workforce management that has been repeatedly upheld by this Court. Here, however, Petitioners challenge both exclusive representation and the service fee (also called an "agency fee" or "fair-share fee") on First Amendment grounds.

I. Unlike in the private sector, state employers choose for themselves whether to permit their employees to bargain collectively, and can also set—within established First Amendment limits—countless other parameters, such as the subjects over which bargaining will occur and the permissibility of strikes. In other words, each state may structure its labor law in the manner that it concludes best promotes sound workforce management. While some states accordingly reject bargaining with their workforces altogether, others reasonably conclude—and indeed, research suggests—that collective bargaining can be an effective way to aggregate, clarify, and channel workers' preferences, and that collective bargaining can promote the state's own efficiency interests by promoting workforce engagement and longevity.

States that permit collective bargaining almost universally adopt the exclusive representation model. Under that model, once a union has been democratically selected by a bargaining unit, the state bargains with only that representative. Further, that union represents all the workers within the unit, including those who do not join the union. The alternative—in which a union represents only those workers within a bargaining unit who choose representation—would allow a potential multitude of unions to demand separate negotiations and separate contracts with an employer. States that adopt collective bargaining almost always reject this system, which threatens to raise bargaining costs and increase intra-workforce conflict.

Likewise, states may reasonably conclude that, within a system of exclusive representation, employees should be required to pay their share of the costs of representation. In particular, states may reasonably conclude that allowing bargaining unit members to choose not to pay their share towards the costs of representation would lead to free riding that would undermine the benefits sought from the exclusive representation system.

Illinois's particular interests in allowing its Medicaid-funded personal assistants to select a union to represent them in bargaining with the state are evident. A union can serve an important quasi-human-resources role in aggregating and communicating information about this geographically dispersed workforce. This information can aid the state in determining how best to attract and retain a qualified and professional workforce, potentially improving service delivery and decreasing program costs. Further, unions can help improve workforce health and safety through cooperative partnerships with public managers, as in this case, where the union has negotiated training and equipment programs.

II. Both exclusive representation and the required agency fee are consistent with the First Amendment. This case is squarely controlled by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and a line of related cases, which there is no reason to revisit. However, even if *Abood* were distinguishable, well-established First Amendment principles demonstrate that Illinois was free to implement its chosen collective bargaining system.

This conclusion does not turn on whether the public assistants are state "employees."

First, public administrators are free to consult selected stakeholders—including elected employee representatives—through non-public channels, and a state's choice to consult some individuals or entities and not others does not even implicate the First Amendment rights of those who are excluded. This larger principle squarely encompasses the exclusive representation system, in which a state determines that it will set workplace policy in consultation with a majority-supported union, and not other unions or individual employees. The only exception to this principle—that states may not selectively exclude individuals from voicing their opinions in *public* fora—is not implicated by this case.

Second, public administrators are free to compel payments to subsidize mandatory economic associations that serve legitimate non-speech purposes. This Court has applied this principle not just in the agency fee context, but also in the contexts of bar dues and mandatory advertising programs. Thus, for the agency fee to be constitutional, Illinois need only show that it serves a larger system of economic association with a legitimate economic purpose. Collective bargaining through an exclusive representative for the purpose of promoting stable labor relations and the effective administration of the personal assistant program easily qualifies under this standard.

Accordingly, Illinois is free to conclude that its interest and those of its citizens in a stable and

professional workforce of public assistants is best served by permitting personal assistants to choose an exclusive bargaining representative, and to require represented personal assistants to pay an agency fee.

ARGUMENT

I. The State Has A Well-Established Interest In Managing Its Workforce By Allowing Personal Assistants to Bargain Collectively

A. The Court Allows States Significant Discretion In Managing Their Workforces

Over 20 million people work for local, state, and federal government. *See* Bureau of Labor Statistics, *Table A-8. Employed persons by class of worker and part-time status*, http://www.bls.gov/news.release/empsit.t08.htm (last visited Dec. 29, 2013). This multifaceted workforce keeps homes and families safe and healthy, educates children and adults, and provides the public infrastructure upon which we depend. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 575 (1985) (Powell, J., dissenting) (describing "fire prevention, police protection, sanitation, and public health" as "activities that epitomize the concerns of local, democratic self-government"). Government employers and administrators must maintain stable and productive relationships with their workforces, especially when they have diverse and even conflicting needs. States have experimented with different approaches to

workforce management. Here, Petitioners challenge Illinois's decision to allow certain publicly funded home-care personal assistants to choose to bargain collectively through an exclusive representative over those working conditions that are set by the state. *Infra* Part I.C.

Recognizing that states require flexibility to manage their workforces effectively, this Court has "often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist*, 553 U.S. at 599; *see also Borough of Duryea v. Guarnieri*, 131 S.Ct. 2488, 2495 (2011) ("Government must have authority . . . to restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve."); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) ("the government as employer indeed has far broader powers than does the government as sovereign"); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 101 (1947) ("For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."). Accordingly, this Court has permitted public sector managers much of the same discretion enjoyed by the private sector. *See NASA v. Nelson*, 131 S. Ct. 746, 759-60 (2011) ("Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will 'efficiently and effectively' discharge their duties.") (citation omitted); *Garcetti v. Ceballos*, 547 U.S. 410, 418

(2006) ("[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions"); *Connick v. Myers*, 461 U.S. 138, 143 (1983) ("[G]overnment offices could not function if every employment decision became a constitutional matter."); *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973) (holding Congress may bar public employees from engaging in certain political activity).

Many public sector employers, like their private sector counterparts, [2] have adopted management policies and practices designed to promote worker voice—that is, to enhance employer-employee cooperation and to productively channel and amplify workers' participation within an organization. Petitioners seek to eliminate one such policy that is available to public employers and administrators—namely, collective bargaining with an exclusive representative chosen by the workers themselves, and supported by a mandatory fair-share fee. *See* Pet. Brief at 18-24. If successful, this dramatic change in state labor policy would both eliminate a time-tested model of workplace

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[2] The alignment of employee and employer incentives through workplace participation has been a significant theme in popular and academic management theory. *See, e.g.*, Eileen Applebaum et al., *Manufacturing Advantage: Why High-Performance Work Systems Pay Off* (2000); Joseph M. Juran, *Quality by Design* (1992); David I. Levine, *Reinventing the Workplace: How Business and Employees Can Both Win* (1995); Saul A. Rubenstein & Thomas A. Kochan: *Learning from Saturn: Possibilities for Corporate Governance and Employee Relations* (2001).

management and depart from fundamental legal principles.

B. The State Has Well-Established Interests In A Collective Bargaining System That Includes Exclusive Representation And Agency Fee Contributions

1. Collective Bargaining Is A Traditional System Of Personnel Management With Potential Benefits For Public Sector Employers

Collective bargaining has been part of the public employment landscape for more than five decades. Wisconsin Employment Relations Act, Wis. Stat. Ann. Ch. 509 (West 1959). Since then, it has become a familiar process that most state governments and the federal government have adopted in some form. Joseph Slater, *The Rise & Fall of SB-5: The Rejection of an Anti-Union Law in Historical & Political Context*, 43 U. Tol. L. Rev. 473, 477-79 (2012).

There is tremendous variation in states' approaches to collective bargaining, making the metaphor of states as laboratories particularly apt. Unlike in the private sector, where federal labor law uniformly regulates employers within many sectors of the economy, *see* 29 U.S.C. § 151 *et seq.* (National Labor Relations Act); 45 U.S.C. § 151 *et seq.* (Railway Labor Act), states choose whether to bargain collectively with their employees. Moreover, a state that legislates in favor of collective

bargaining by public employees may then set additional parameters, including the subjects over which unions may bargain, the legality of employee strikes, and the availability of various dispute resolution mechanisms. The extent of states' discretion in this area is illustrated by the varied approaches that they have taken:

> [State public sector labor] laws both vary considerably and are more subject to political shifts at a local level. A minority of states does not permit any public employees to bargain, and another minority only permits a few types of public employees to bargain. . . . Also, where collective bargaining is authorized, the scope of bargaining is generally narrower—sometimes quite a bit narrower—than in the private sector. Further, the majority of states do not allow any public employees to strike.

Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 Hofstra Lab. & Emp. L.J. 511, 512-13 (2013) (hereinafter Slater, *Unsettled State*). Accordingly, states can structure their labor laws to amplify those aspects of collective bargaining that they view as most helpful, and correspondingly to downplay or eliminate other aspects (such as the strike) that they view as counterproductive.

However, there are also First Amendment limits to states' freedom to innovate in this area,

which protect individuals' rights not to associate with a union. States may not require their employees to become union members or pay the costs of union ideological or political endeavors; at most, they may require represented employees to pay for the costs associated with collective bargaining and other activities that are germane to the representation. *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 301-02 (1986). Further, bargaining unit members are entitled to notice and other protections of these rights, *id.* at 308-09.

There are good reasons that some states adopt a system of public sector bargaining. One reason is to enhance employer-employee communication. The benefits of providing workers with a collective voice are evident in the reasons that workers themselves give for wanting better communication with managers: not just to improve the quality of their own lives, but also to make their employers more successful. Richard B. Freeman and Joel Rogers, *What Workers Want* 4-5 (1999).

Unions are a traditional avenue for amplifying, clarifying, and channeling worker voice, allowing management to better account for worker views and priorities. This role in aggregating and funneling employees' perspectives not only helps those employees to feel more useful and engaged, but it also has been linked to certain productivity gains, including lower turnover, search, and retraining costs. *See* Kenneth G. Dau-Schmidt and Arthur R. Traynor, *Regulating Unions and Collective Bargaining*, in *Labor and Employment Law and Economics* 96, 109 (Kenneth G. Dau-Schmidt *et al.*

eds., 2009). Empirical studies have found that where mature collective bargaining relationships develop, "unions can increase firm productivity in certain industries, particularly if management constructively embraces, rather than fights, union contributions." *Id.* at 109-10; *see also* Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 19 (1985) (arguing that their empirical analysis showed that "unions are associated with greater efficiency in most settings"). The potential benefits of this arrangement are obvious, in that it helps public employers to improve morale and satisfaction as efficiently as possible. Samuel Estreicher, *"Easy In, Easy Out": A Future for U.S. Workplace Representation*, 6 (Nov. 30, 2013 draft), at: http://lawprofessors.typepad.com/files/labor-law----easy-in-easy-out----december-12-2013.pdf ("[c]ollective bargaining provides a means for workers to collectively express their preference for [a particular workplace policy] and for parties to determine whether the collective benefits outweigh the collective costs of its provision"). Not only would it be logistically difficult for a public administrator to replicate the union's function in this regard (particularly when the relevant workforce is dispersed), but a unilaterally determined outcome could lack legitimacy in the eyes of the workforce.

In sum, governments may reasonably decide to allow their workers to bargain collectively for a host of reasons, including their judgment that unions can streamline workforce management. Although Petitioners do not directly attack collective bargaining itself, they seek to prevent governments

from structuring public sector bargaining to require or allow either exclusive representation or the agency shop. The next two subsections explain why public employers often conclude that these features are crucial to an effective system of public-sector bargaining.

2. Exclusive Representation Is A Fair And Efficient Structure For Public Sector Collective Bargaining

The American system of collective bargaining is built upon the premise of exclusive representation as chosen by a majority of workers. *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975) ("Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule."); Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry Into A "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 47 (1998) ("[t]he fundamental ordering principle which shapes American labor law and collective bargaining is the principle of exclusive representation"). Petitioners challenge Illinois's decision to implement the exclusive representation system for home health care personal assistants. Pet. Br. at 35. They suggest that, to the extent Illinois wishes to allow personal assistants to choose union representation, that representation should take place on a members-only basis. However, members-only representation presents significant complications, potentially undermining or eliminating the advantages of collective bargaining

that lead states to permit bargaining in the first place.

In a "members-only" or "minority-union" regime, unions negotiate only on behalf of those who want representation. Non-members are not bound to union representation; conversely, the union owes non-members no duty. *Cf. Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). From an employer's perspective, however, exclusive representation is a significantly more straightforward system. There are only two tracks for each unit of employees: no representation or complete representation by one bargaining agent. Either the state will determine working conditions unilaterally, or it will meet with a single union, which is in turn obligated to fairly represent all bargaining unit members during the negotiation. The importance of this aspect of the exclusive representation system should not be understated; indeed, some states structure their public sector labor law with an eye towards minimizing the number of different contracts that must be negotiated and administered even among different bargaining units. *E.g.*, Wash. Rev. Code § 41.80.020(3) (2013) (requiring public sector unions representing separate bargaining units to bargain in coalition over health care benefits, with the resulting agreement to be common to all CBAs).

In contrast, members-only bargaining would allow a potential multitude of unions within a single bargaining unit to each demand a right to separately negotiate with the employer over employment terms and conditions for their own members, resulting in different contracts for similarly situated employees.

Such a system would multiply the employer's negotiation costs and greatly complicate the ramifications of such bargaining. It would tend to generate instability and discourage compromise, as each union could compete with others on a continuing basis to demonstrate its ability to gain "more" for its members (and attack any others for accepting "less"). Multiple-union units also have a much greater potential for discord between unions, leading to a greater chance of strikes or other disruption. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983) (observing that the "exclusion of the rival union may reasonably be considered a means of insuring labor-peace" by preventing the employer from "becoming a battlefield for inter-union squabbles"); *Abood*, 431 U.S. at 224 (discussing the "confusion and conflict that could arise if rival . . . unions, holding quite different views as to [terms and conditions of employment], each sought to obtain the employer's agreement"). Such workplace disruption poses special concerns for public employers and administrators:

> Disputes during labor negotiations are especially costly in the public sector. In the private sector, competitors can provide goods or services that are not supplied by the striking workers. In the public sector, however, the government is often the sole supplier of a service. In many cases this service is essential, and disruption of its supply could be life threatening.

Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J.L. & Econ. 519, 519 (1994).[3]

Further, exclusive representation removes employees' incentives to undercut or derogate their colleagues who are on the "outside," as could occur in a system of members-only bargaining. In a members-only system, union-represented employees could try to cut a sweeter deal for themselves at the expense of the nonmembers, or employers could reward nonmembers exorbitantly in order to dissuade union membership. In either situation, however, the members-only system results in conflict and disequilibrium.

States that have opted for a system of collective bargaining almost universally require exclusive representation of employee bargaining units. Their interests in stable representation equilibria, ongoing constructive dialogue, and reduced probabilities for strikes and other conflict all justify this decision.

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[3] States have responded to this concern in part by prohibiting public-sector strikes in many circumstances. Slater, *Unsettled State*, 513 (noting that "the majority of states do not allow any public employees to strike"). However, states may also reasonably conclude that exclusive bargaining is more likely to reduce the risk of damaging public-sector shutdowns. *Cf.* Currie & McConnell, 520 ("Strike costs, as measured by the incidence and length of strikes, are greatest in the absence of legislation requiring employers to bargain.").

3. The Fair Share Fee Is An Important Component Of An Effective System Of Exclusive Representation

Petitioners contend that even if exclusive representation is constitutionally permissible, represented public sector workers should nonetheless be permitted to opt out of paying their share of the costs incurred by their elected representatives. Pet. Brief at 34-36. But just as exclusive representation supports employer interests including "labor peace," *Abood*, 431 U.S. at 224, the agency shop is critical to solving the free-rider problem that could otherwise unravel or seriously weaken collective representation arrangements.

Agency fee agreements require represented employees to pay their "fair share" of the costs of union representation.[4] The reason for the agency shop is straightforward as a matter of economics. Under a system of exclusive representation, the elected union has a duty to represent all employees within the bargaining unit, and the benefits of collective bargaining flow to all as well. *Steele*, 323 U.S. at 202 ("It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be

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[4] Petitioners make no allegation that their funds are going to anything other than the costs of negotiating and administering a collective bargaining agreement. *Harris v. Quinn*, 656 F.3d 692, 696 (7th Cir. 2011) (noting that Petitioners "do not allege that the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining").

deemed to dispense with all duty toward those for whom it is exercised unless so expressed."). The economic consequences of eliminating the agency fee—the free rider problem—are easy to model. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 88 (1971 ed.) ("A rational worker will not voluntarily contribute to a (large) union providing a collective benefit since he alone would not perceptibly strengthen the union, and since he would get the benefits of any union achievements whether or not he supported the union."); Richard A. Posner, *Economic Analysis of Law* 430 (8th ed., 2011) ("The representation election, the principle of exclusive representation, and the union shop together constitute an ingenious set of devices . . . for overcoming the free-rider problems that would otherwise plague the union . . . ."). The empirical evidence supports the model's predictions. *See* Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. Rev. 319, 354 & n.187 (2012) ("[s]everal studies show that the level of free riding is higher in right-to-work states") (citing studies).

This court has previously acknowledged this economic reality. *See Abood*, 431 U.S. at 221-22 (the "union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become free-riders") (internal quotation marks, citations, and footnote omitted)). Likewise, Justice Scalia explained in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) that:

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule . . . is that in some respects they are free riders whom the law requires the union to carry—indeed, requires the union to go out of its way to benefit, even at the expense of its other interests.

Id. at 556 (Scalia, J., concurring in part and dissenting in part).

Petitioners' arguments against agency fees demonstrate the interconnectedness of such fees with the American system of collective bargaining and exclusive representation. They argue that agency fees cannot be justified by the exclusive representation responsibility because unions choose such responsibility. Pet. Brief at 35. But this ignores that Illinois law requires unions to undertake this responsibility if they wish to represent any employees at all, *infra* Part I.C. And as discussed earlier, states have good reason for mandating exclusive representation as part of their collective bargaining systems, *supra* Part I.B.2.

Eliminating agency fees would disrupt the intricate collective bargaining machinery

constructed by Illinois and other states to serve their employment needs. Exclusive representation and the agency shop are closely linked, and a state that chooses the former has strong economic reasons to adopt the latter as well. As a matter of policy, economics, and constitutional law, states should be free to provide for collective-bargaining relationships like the one at issue here.

C. Illinois Has Reasonably Chosen Collective Bargaining By Personal Assistants As Its System Of Personnel Management for Its Home-Care Program

Petitioners argue that, even if states generally have interests sufficient to support their systems of collective bargaining, Illinois has no such interest here. Pet. Br. at 24-31, 39-46. However, Illinois has perhaps a greater interest in establishing a system of collective representation in the home health care arena, given the challenges it faces in managing service provision in this context. Whereas the previous two subsections have shown why states generally may choose to allow their workforces to bargain collectively, this subsection focuses on the role of collective bargaining in Illinois's administration of the home-care personal assistant program.

Like many other states, Illinois allows its workforce to select bargaining representatives. *See* Public Labor Relations Act (PLRA), 5 Ill. Comp. Stat. 315/1 *et seq.* Under the PLRA, a union chosen on a majority basis by the members of a bargaining unit becomes that unit's exclusive representative for

purposes of contract negotiations about employment terms, and must represent all bargaining unit members fairly. 5 Ill. Comp. Stat. 315/3(f), 315/9(a-5), 315/6(d). Further, Illinois law permits the state to agree to an agency shop. 5 Ill. Comp. Stat. 315/6(e).

Illinois's Medicaid-funded Home Services Program (Rehabilitation Program) provides care to disabled individuals in their homes. *See* 20 Ill. Comp. Stat. 2405/1 *et seq.*; 89 Ill. Admin. Code 676.10 *et seq.* The advantages of home care include lower costs for housing, greater comfort for customers, and easier access for family and loved ones. *See* 89 Ill. Admin. Code 676.10(a). However, managing the provision of care across thousands of homes requires innovative and flexible approaches in order to balance customers' privacy and control with the interests of the state in ensuring proper care for its entire eligible population. Illinois has chosen to permit its over 20,000 personal assistants who serve customers through this program to choose whether to bargain collectively. 5 Ill. Comp. Stat. 315/3(n)-(o); Public Act 93-204 (Dist. Ct. Doc. 32-10).[5]

The State has a set of diverse interests in managing the long-term and ongoing relationships between itself, customers, and personal assistants. Further, it has reasonably concluded these interests are best served by offering the personal assistants an opportunity to bargain collectively. Three of

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[5] The Disabled Persons Rehabilitation Act was similarly amended. 20 Ill. Comp. Stat. 2405/3(f); Public Act 93-204 (Dist. Ct. Doc. 32-10).

these interests—managing employee productivity, protecting customer health and safety, and protecting personal assistants' health and safety—are discussed further below.

1. As the entity responsible for paying personal assistants to provide home care services within a state program, Illinois has an employer's interest in managing workforce productivity to ensure services are readily available, effective, and efficient.

A union's role in aggregating employee voice, *supra* Part I.B.1, is especially important in the home care context. Unions can collect information about the issues faced by geographically dispersed personal assistants, including employment problems they are encountering and suggestions they have for improvements, and communicate that information to the state in an organized fashion. Essentially, the union can serve as a quasi-human-resources department for a set of workers whose dispersion would otherwise present a serious management challenge. Further, qualitative studies of the health care industry have demonstrated that unions help build teams, foster the growth of human capital, and improve patient outcomes. Thomas Kochan, *Will the Supreme Court Support or Block Development of a Modern Collective Bargaining System for Homecare Workers?*, at 8, Dec. 10, 2013, at: http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/field-content-file/pdf/Michael%20Lillich/Kochan%20Commentary%20on%20Harris%20v%20Quinn%20Case%2012%2010%2013%2013.pdf (hereinafter Kochan, *Homecare*)

("The Kaiser Permanente study . . . documents the significant investments in resources, time, and personnel required of unions to develop the capacity and mobilize and serve the workforce in partnership, team, and network building activities.").

2. Moreover, the State has an interest in protecting customer health and safety by ensuring a stable and well-qualified workforce available to all qualified customers who could benefit from the program. The State pursues this interest—balanced against its interest in ensuring that customers are empowered to decide among individual workers—in part through its hiring qualifications and review process for personal assistants. 89 Ill. Admin. Code 686.10. However, the interest is a continuing one that goes beyond any individual customer's choice of a particular personal assistant. In particular, the state has an interest in attracting qualified workers into the program and lowering the turnover rate among personal assistants, because longevity contributes to a competent and professional workforce. This interest is particularly acute in the home health care field, which is plagued with high turnover based in part on low wages and worker dispersion and isolation. *See* Kochan, *Homecare*, 2.

Unions can serve the State's interests in customer health and safety by helping to lower employee turnover, cut search and retraining costs, and boost productivity in the context of a cooperative partnership with an employer. *See supra* Part I.B.1; *see also* Kochan, *Homecare*, 9 (recent research "demonstrates that productivity, quality, customer satisfaction, and employee satisfaction are enhanced

when union and management leaders work together and apply state-of-the-art concepts and tools to foster a cooperative, low conflict, high employee involvement, *transformed* workplace" (emphasis in original)). Perhaps most obviously, union-negotiated benefits can reduce personal assistants' incentives to leave the field. For example, the current collective bargaining agreement in this case established significantly improved (yet still modest) wages, CBA, Art. VII, Sec. 1, a health benefits fund, Art. VII. Sec. 2; a Personal Assistants Training Program administered jointly by the State and the union, Art IX, Sec. 1 & CBA at 18-22 (Side Letter); an orientation program, Article IX; a grievance procedure with binding arbitration for wage, hour, and other contractual disputes, Article XI; and a no-strike clause that prohibits work stoppages, Art. XII, Sec. 5.[6] These improvements stabilize the workforce and lead to better care for customers.

3. Further, the State has a particular interest in its own workforce's health and safety. While this is true of all public employees, entering another person's home to provide personal, intimate care can entail unique safety concerns. *See* Gurumurthy Ramachandran *et al.*, *Handling Worker and Third Party Exposures to Nanotherapeutics During Clinical Trials*, 40 J.L. Med. & Ethics 856, 862 (2012) ("While the employer of the workers may be responsible for the health and safety of the workers, they may not

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[6] The current CBA is available on the Illinois Department of Central Management Services website at: http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_seiupast.pdf.

have complete control over exposures in the home."). Unions and employers have developed a variety of programs for protecting health and safety. Some are as straightforward as encouraging employees to report health and safety problems so they can be addressed quickly (and creating a mechanism for them to do so), or calling for the provision of gloves to address an existing health and safety concern, CBA, Art. IX, Sec. 2. Others are more complex, such as the creation of a joint committee to study health and safety issues, Art. IX, Sec. 1; or the provision of employee home health care training—something that is underprovided in the home health care field, and that may require creative approaches to effectuate. *See* Ramachandran, 40 J.L. Med. & Ethics at 862. ("[t]he training of home care workers is variable and often inadequate.").

All but one of the Petitioners in this case provide home care as an assistant to a family member. J.A. 17-18. The State's interest in the provision of care by these assistants is not diminished by Petitioners' familial relations. In fact, for many personal assistants who are related to their customers, their relative isolation and inexperience in this labor force make the union's experience and the union-negotiated training opportunities even more important. However, the state has an even greater interest in ensuring quality services for the many customers who cannot (or who prefer not to) rely on family members for personal assistant services.

II. Public Employers And Administrators May Agree To Exclusive Representation And The Agency Shop In Order To Effectively And Efficiently Deliver Home Health Care

The previous section discussed why states like Illinois have reasonably decided to allow personal assistants the opportunity to elect a union to represent them in bargaining. Permitting union representation—including exclusive representation and the agency shop—helps achieve government interests including stabilized labor relations and the development of a qualified, professional workforce. This section shows why this policy choice does not violate the First Amendment, and why exclusive representation and the agency shop are instead consistent with a long line of settled case law from a variety of contexts.

As an initial matter, *amici* maintain that this case is squarely controlled by *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and that there is no reason to revisit *Abood* or any of the other cases upholding the constitutionality of the agency shop. [7]

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[7] Petitioners imply that *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) is the only case that this Court would need to overturn should petitioners prevail in their position that public sector exclusive representation and the agency shop arrangements are unconstitutional. Pet. Br. at 16-36. As this Part demonstrates, that is incorrect; in fact, petitioners' position is inconsistent with a series of cases concerning the constitutionality of cooperative economic programs involving compelled payments, such as bar associations and agricultural advertising schemes, *infra* Part II.B, as well as with First Amendment cases concerning governmental policymaking,

Nonetheless, this section shows that even if this Court were to conclude that *Abood* is not on all fours with the facts of this case, there is no First Amendment barrier to Illinois's chosen collective bargaining system.

This Court generally defers to government managerial decision-making, protecting government's ability to act freely in its role as "manager of its 'internal operation,'" as distinct from its role as sovereign. *Nelson*, 131 S.Ct. at 757 (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)); *see also Engquist*, 553 U.S. at 598. Accordingly, this Court

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including (though not limited to) cases arising in the public employment context, cited in this Part.

Further, Petitioners mischaracterize *Abood* as an anomaly in which the Court imported the "labor peace" rationale from the Commerce Clause context, Pet. Br. at 19-21. To the contrary, *Abood* rested on a series of previous First Amendment cases arising in the context of the Railway Labor Act, and it has been repeatedly reaffirmed in the public sector context. *E.g.*, *Railway Employees Dep't v. Hanson*, 351 U.S. 225, 238 (1956) (union shop agreement under Railway Labor Act did not violate First Amendment); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 746-48 & 768-69 (1961) (characterizing *Hanson* as First Amendment decision and construing Railway Labor Act to avoid constitutional problems); *Hudson*, 475 U.S. at 301; *Lehnert*, 500 U.S. at 555-56 (Scalia, J., concurring in the judgment in part and dissenting in part) (construing the "constitutional rule suggested in *Hanson* and later confirmed in *Abood*" and describing "compelling state interest" that supports constitutionality of agency shop); *Locke v. Karass*, 555 U.S. 207, 213-14 (2009) (characterizing constitutionality of agency shop in public sector as "general First Amendment principle"). These cases would also be vulnerable in the event that this Court overruled *Abood*.

has often held that the First Amendment rights of individuals who perform work for the government can be overcome by government proprietors' exercise of their managerial prerogatives to effectively and efficiently provide services. *E.g.*, *Guarnieri*, 131 S.Ct. at 2494 (government's "substantial interest in ensuring that all of its operations are efficient and effective" justify "[r]estraints" on workforce); *Garcetti*, 547 U.S. at 418 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom"). Further, the government's status a "proprietor" or "manager" of internal operations is not limited to situations in which it is also a common-law "employer." *Nelson*, 131 S.Ct. at 758-59 (rejecting argument that diminished First Amendment protections applicable to public employees did not apply to independent contractors); *see also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721-22 (1996) (First Amendment protections do not turn on common-law distinction between contractor and public employee); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678-80 (1996) (same). Accordingly, these principles control even if this Court concludes that Illinois is not the technical employer of the personal assistants.

For the reasons that follow, Illinois's decision to permit personal assistants to choose an exclusive representative was a valid exercise of the state's managerial prerogative.

A. Exclusive Representation Is Consistent With The First Amendment Because Governments May Decide With Whom To Consult Before Setting Working Conditions

Petitioners argue that Illinois's adoption of the exclusive representation system violates the First Amendment because "homecare providers are not managed or supervised by the State." Pet. Br. at 39. Putting aside the factual accuracy of that statement,[8] it is irrelevant to the First Amendment analysis. Petitioners' argument regarding exclusive representation assumes that governments may not consult some stakeholders through a non-public channel that is not available to all stakeholders. But government entities are generally free to privately consult anyone, including a union designated by a majority of the workforce, in making its decisions; conversely, governments are generally free to ignore anyone, including individual workers. The exception to this general principle—that government may not exclude individuals, including union-represented public employees, from being heard in public fora—is not applicable here.

This Court's decision in *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984) is largely dispositive of this issue. *Knight* concerned the constitutionality of Minnesota's exclusive

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[8] As Respondents Quinn and SEIU HII describe, Illinois has considerable oversight over the personal assistants as their joint employer. Quinn Br. at 48-50; SEIU HII Br. at 1-3 & 46-47.

representation rule under which the state would either bargain or "meet and confer" over terms and conditions of employment only with elected exclusive representatives of professional employees. *Id.* at 274-75. A group of community college faculty brought a First Amendment challenge, claiming, in this Court's words, "an entitlement to a government audience for their views." *Id.* at 282. Rejecting that claim, the Court reasoned that "Minnesota has simply restricted the class of persons to whom it will listen in its making of policy," which it was free to do because "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 282, 283.

In other words, Petitioners' First Amendment rights are not even *implicated* by Illinois's decision to adopt the exclusive representation system for negotiations over certain employment terms, because states are generally free to set workplace policy in a non-public process in consultation with some constituent groups—here, an organization selected by the affected workforce itself—and not others. Moreover, this principle does not depend on whether the state is acting as an employer. *Id.* at 286 ("[a]ppellees thus have no constitutional right as *members of the public* to a government audience for their policy views") (emphasis added); *see also Smith v. Ark. State Highway Employees*, 441 U.S. 463, 465 (1979) ("the First Amendment does not impose any affirmative obligation on the government to listen, to respond, or . . . to recognize the association and bargain with it").

Conversely, Petitioners remain free to advance any position, including positions that are adverse to the state or the union, either individually or in concert, through any channels that are open to the public. *City of Madison v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175 (1976) (union-represented employees have First Amendment right to speak "[w]here the State has opened a forum for direct citizen involvement"); *Lehnert*, 500 U.S. at 521 (employees are "free to petition their neighbors and government in opposition to the union which represents them"). However, this principle bears no relevance to this case, because Petitioners do not allege that Illinois has opened the bargaining process to the public, yet excluded Petitioners. *Cf. City of Madison*, 429 U.S. at 178-79 ("the First Amendment plays a crucially different role when . . . a government body has . . . determined to open its decisionmaking processes to public view and participation") (Brennan, J., concurring). Nor does bargaining with an exclusive representative itself create a public forum. *Perry Education Ass'n*, 460 U.S. at 48-49 (opening school mail system to union with exclusive representative status did not trigger obligation to allow rival union mail system access).

Accordingly, this Court's settled precedent is entirely consistent with Illinois's decision to adopt the exclusive representation system.

B. The Agency Shop Is Constitutional Because It Is Germane To A Larger Program Of Economic Association With Legitimate Economic Ends

Governments may compel payments to subsidize mandatory economic associations that in turn serve legitimate economic ends. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997) (mandatory payment permissible "as a part of a broader collective enterprise in which [participants'] freedom to act independently is already constrained by the regulatory scheme"); *see also United States v. United Foods*, 533 U.S. 405, 413 (2001) (compelled payments to private organization permissible as part of required economic cooperation where there is "some state imposed obligation which makes group membership less than voluntary"). This principle underlies not just *Abood* and other cases concerning the agency shop, *supra* n.6, but also cases concerning mandatory bar dues and generic agricultural advertising schemes. These cases reveal that governments may solve collective economic problems through mandatory associations, including by requiring participants to make payments to support these associations.[9] Thus, Illinois need only show that it adopted the agency shop within its workforce of personal assistants as part of a larger regulatory system of economic cooperation with a predominantly non-speech-

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[9] This principle should apply *a fortiori* in the context of the public sector workforce, itself a form of economic association in which states' heightened managerial interests can often overcome workers' First Amendment interests. *Supra* Part II.

related purpose. Here, that system is collective bargaining through an exclusive representative, and its purpose is the promotion of stable labor relations in order to achieve the goals described in Part I.C.

This Court has generally permitted governments to address collective economic problems by requiring a regulated community to associate. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (describing "minimal constitutional protection of the freedom of commercial association"). Further, members of the regulated community may be required to financially contribute to the association's work that is germane to the legitimate economic purpose. Accordingly, *Abood* began by identifying the larger collective enterprise of which the agency fee was a part: allowing bargaining units of public sector workers to select an exclusive representative, to achieve labor peace. 431 U.S. at 224. The Court relied on Michigan's judgment that the agency shop was an important component of effective union representation of public sector workers, for many of the reasons discussed in Part I.B, before ultimately holding that bargaining unit members could be required to fund only those expenses that are "germane to [a union's] duties as collective-bargaining representative." *Id.* at 223, 232, & 235. This case falls squarely within that holding.

The Court has applied this approach in other cases concerning compelled subsidization of mandatory associations. For example, in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), the Court

applied *Abood* in permitting mandatory bar dues to the extent they are germane to "the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13. Like in *Abood*, the Court did not apply strict scrutiny, which would have demanded that California show that there were no alternatives—either to its regulation of lawyers through a non-governmental bar association, or to the bar association's decision to levy mandatory (rather than optional) dues—that did not require the mandatory payment. *Compare id.* at 12 (concluding that it was "appropriate" to require attorneys to contribute to bar associations) *with Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (strict scrutiny requires government to show interest of compelling importance that cannot be achieved through alternative method).[10] Further, this was so even though the Court acknowledged that at least some germane bar association activities were likely to be ideologically objectionable to some bar members. *Keller*, 496 U.S. at 15-16 (bar association activities not germane if they both had "political or ideological coloration" and were "not reasonably related to the advancement" of regulation of the legal profession).

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[10] For example, the Court did not require California to show that it could not have achieved the attorney regulation it desired by making the bar association an arm of public government, in which case the objectors would have had no tenable challenge to mandatory assessments. *See Johanns v. Livestock Marketing Ass'n.*, 544 U.S. 550, 562 (2005) ("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech"); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting First Amendment challenge to social security tax).

Finally, in *Glickman*, the Court upheld a requirement that fruit producers contribute to a generic advertising program as part of a larger agricultural marketing program intended to maintain steady food supplies and prices. 521 U.S. at 461-62. Again, the Court emphasized that the government was free to achieve its goal through a comprehensive cooperative program of which compelled payments were one part, relying on both *Keller* and *Abood*. *Id.* at 473; *see also United Foods*, 533 U.S. at 412 (emphasizing that *Glickman* "proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules"). As in those cases, the Court did not require the government to prove that the required association and payment was the least restrictive way to support agricultural prices. Further, once the government identified the legitimate interest served by the system of economic cooperation, the Court upheld the compelled payment by determining that it was germane to that interest.[11] *Glickman*, 521 U.S. at 473.

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[11] The *Glickman* dissenters argued that the majority applied *Abood* too broadly—arguing that the mandatory subsidization in *Glickman* was not justified by the underlying cooperative economic interest—but they did not question the continued validity of *Abood* itself. *Glickman*, 521 U.S. at 485 (Souter, J., dissenting). Rather, they characterized *Abood* as "a specific instance of the general principle that government retains its full power to regulate commercial transactions directly, despite elements of speech and association inherent in such transactions," *id.* at 484-485.

These cases demonstrate this Court's approach in cases like this one, in which economic regulatory policy involves both required economic association and mandatory payments to support the association. Under this approach, Illinois need only identify the legitimate economic purpose of the required economic association of which the agency shop is a part, and then show that the agency fee covers costs that are germane to that purpose. Moreover, *Keller* and *Glickman* illustrate that this approach does not turn on employment status, as both involved regulation of non-employees.

United Foods is fully consistent. There, the Court rejected a generic advertising program that did not involve a cooperative economic program of which required payments to a private entity were only one component; instead, the "only program the Government contends the compelled contributions serve is the very advertising scheme in question." 533 U.S. at 415. Here, however, the payments are integral to the mandatory economic association, which is in turn designed to achieve a legitimate economic goal: a collective bargaining system based on exclusive representation, in service of labor stability and the generation of a more professional workforce of personal assistants. This is none other than the "labor peace" rationale articulated in *Abood*.

Put another way, the state's chosen method of achieving labor peace is not limited to compelled payments that support speech. The agency fee undergirds the exclusive representation system, which, as described above, does not implicate First

Amendment rights. Further, both the agency fee and the exclusive representation system are cornerstones of the comprehensive collective bargaining structure that Illinois has erected. Collective bargaining is itself a form of economic association, as this Court's cases treating both collective bargaining and labor unions themselves as economic, rather than expressive, institutions, illustrate. *See Roberts*, 468 U.S. at 638 (O'Connor, J., concurring in part and concurring in the judgment) ("a State may compel association for the commercial purposes of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances, but it may not infringe on associational rights involving ideological or political associations"); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428 (1990) (strike by non-employee attorneys not protected by First Amendment because government has greater power to regulate "economic" than "political" activity); *Int'l Longshoremen's Ass'n v. Allied Intern., Inc.*, 456 U.S. 212, 225-26 (1982) (describing "political objective" as "far removed from what has traditionally been thought to be the realm of legitimate union activity") (internal quotation marks and citation omitted); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) ("[t]he interests of the contestants in a labor dispute are primarily economic"). Accordingly, the *Abood-Keller-Glickman* line of cases, rather than *United Foods*, controls this case.

In addition to the foregoing, regulatory schemes governed by the Court's economic association cases must "impose no restraint on" freedom of expression; must not "compel any person to engage in any actual or symbolic speech," and must not compel covered individuals to "endorse or to finance any political or ideological views." *Glickman*, 521 U.S. at 469-70. Petitioners argue that collective bargaining in the public sector is often inherently political. Pet. Br. at 41-42 & n.12. Putting aside *Abood*'s own resolution of this issue, this Court has rejected the argument that public sector working conditions are inherently matters of public concern. *Guarnieri*, 131 S.Ct. at 2497 ("The Petition Clause is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances."); *Connick*, 461 U.S. at 148 (public employee's concerns about confidence and trust in supervisors, office morale, and felt need for a grievance committee not matters of public concern). But more significantly, even if these matters do in some sense involve "public concerns," this Court's decisions make clear that the First Amendment associational interests of individuals working in government service, even when relating to public concerns, must be balanced against governments' legitimate managerial interests. *See, e.g., Nat'l Ass'n of Letter Carriers*, 413 U.S. at 564-65 (upholding legislative ban on certain political activity by federal executive employees that serves government interests in efficient operations); *Mitchell*, 330 U.S. at 99 ("If . . . efficiency may be best obtained by prohibiting active participation by

classified employees in politics as party officers or workers, we see no constitutional objection."). Here, Petitioners are free to express their views on any issues they like. They only claim a right to prevent the state from structuring its internal personnel relations in the manner it has determined most efficiently serves its managerial interests.

Accordingly, Illinois is free to conclude that its interests and those of its citizens—particularly the customers who are served by personal assistants—are best served when working conditions are set during bargaining with an elected exclusive representative. The state is further free to require that personal assistants make agency fee payments in support of that larger program of economic cooperation, adopted to ensure a stable and professional workforce of personal assistants.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be *affirmed*.

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APPENDIX

Appendix A

The *Amici* professors have substantial experience in labor law. Their expertise thus bears directly on the issues before the Court in this case. *Amici* are listed in alphabetical order below. Institutional affiliations are provided only for identification purposes.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS *et al.*,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether a State may, consistent with the First and Fourteenth Amendments to the Constitution, compel homecare providers to accept and financially support a private organization as their exclusive representative to petition the State for greater reimbursements from its Medicaid programs?

Whether homecare providers may challenge a law that permits the State to compel them to associate with a union before the State has designated the particular union that will represent them?

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1988, the Mackinac Center for Public Policy is a Michigan-based nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The instant case concerns the Mackinac Center as it has challenged similar governmental activities within the State of Michigan.

SUMMARY OF ARGUMENT

1. Organized labor has suffered a well-publicized, decades-long decline in membership. As one of the strategies for reversing this trend, organized labor launched a major national initiative to increase its membership by redefining employer-employee relations when state or local governments help compensate a service rendered. Of particular interest are home help workers, who provide personal assistance to the elderly and disabled in their own homes. Although care providers are employed by their individual clients, their compensation often occurs through public assistance provided by a state governmental agency for the care recipient. In the mid-1980's organized labor launched a strategic effort to create a new labor market among home help providers.

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1. All parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel to *amicus curiae* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Early organizing drives in Illinois and California attempted to classify home help providers as public employees. These attempts were unsuccessful because courts and state labor boards recognized that home help providers did not have a public employer, nor were they government employees.

Organized labor shifted its strategy, first in California and then in other states. The new approach involved the creation of a public authority that could serve as the purported employer of home help care workers. The new approach involved the creation of a public authority that could serve as the purported employer of home help care workers. The unionization of these providers is unique in that privately employed individuals, who are compensated through needs-based government assistance programs, are organized collectively despite having no formal, professional affiliation with each other. Unions in several states have successfully organized these private individuals into a bargaining unit of "public employees" for the purpose of petitioning the state for changes to public assistance programs. The Seventh Circuit failed to appreciate the true nature of these arrangements in holding that home help providers are public employees.

2. The effort to organize privately employed home health care workers was instructive for Michigan labor organizations, who then sought to organize home help providers similarly situated to Petitioners in the instant matter and later in-home child care providers. Michigan, notably, is one of only a few states to authorize and implement the unionization of home help providers, only to later abandon the arrangement. The unionization of home help providers became heavily contested and resulted in intense public scrutiny due to litigation in state

and federal courts, several legislative enactments and a proposed amendment to state constitution. A discussion of the Michigan home help provider unionization and the subsequent repeal of the policy illustrates how this new model of unionization functions.

3. A review of home help unionization efforts around the country demonstrates that these arrangements share consistent attributes: the classification of private caregivers as public employees for the sole purpose of collective bargaining, as well as the lack of "employer" control over the hiring, supervision or termination of home help providers. The strategic value of these unionization efforts is apparent, as organized labor has won some of its largest organizing victories in decades by organizing home help and child care providers. Given the impingement on the First Amendment rights of home help workers, and the lack of a compelling state interest in doing so, the Seventh Circuit erred in extending the holding of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) to apply to Petitioners.

ARGUMENT

I. Declining Membership Leads Organized Labor's National Efforts to Unionize Home Help Providers

Organized labor has suffered a well-publicized, decades-long decline in membership.[2] At its in the

2. *See* Alana Semuels, *Union membership in the U.S. continues its long decline*, Los Angeles Times, Jan. 23, 2013; Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, The New York Times, Jan. 23, 2013, at B1; Melanie Trottman and Kris Maher, *Organized Labor Loses Members*, The Wall Street Journal, Jan. 23, 2013.

1950's, union membership represented 35 percent of the total workforce. Union membership as a percentage of the national workforce has since fallen to historic lows, representing just 11.3 percent of the workforce today, and a mere 6.6 percent of private-sector workers.[3]

As one of the strategies for reversing this trend, organized labor launched a major national initiative to increase its membership by redefining employer-employee relations when state or local governments help compensate a service rendered. Labor organizations began organizing home help providers, who provide personal assistance to the elderly and disabled in their own homes, such as bathing, meal preparation, shopping, and administrating medications.[4] Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 Lab. Stud. J. 1, 3 (2002).

Although care providers are employed by their individual clients, their compensation often occurs through public assistance provided by a state governmental agency for the care recipient. Organized labor's new initiative to organize these care providers represented a "strategic intervention of the union in the formation of a new labor

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3. Press Release, *Union Members – 2012*, Bureau of Labor Statistics (Jan. 23, 2013), *available at* http://www.bls.gov/news.release/union2.htm.

4. Due to multiple jurisdictions discussed herein, workers providing in-home care services are referred to using a variety of labels, including "home help providers," "homecare providers," "personal assistants," and "personal care attendants." Unless quoting from a cited source, this brief refers to said workers as "home help providers."

market," which "established a new form of industrial relations." *Id.* at 18.

Organized labor has encountered problems seeking to organize home help employees. Organizing the workers under the National Labor Relations Act (NLRA) was precluded; the NLRA defined "employee" to exclude both those "in the domestic service of any family or person at his home" and "any individual having the status of an independent contractor." 29 U.S.C. § 152(3). Further complicating matters for organized labor was the NLRA definition of "employer," which excludes "any State or political subdivision thereof." 29 U.S.C. § 152(2).

The National Women's Law Center discussed the challenges related to organizing child care providers, which are analogous to home help providers:

> Child care centers may be difficult to organize, but at least there is a traditional employer-employee relationship between the owners and staff. In contrast, home-based providers do not easily fit into a legal status that permits them to unionize. The federal labor laws that cover the private sector expressly exclude both independent contractors and persons providing domestic services in another person's home from the legal definition of "employee." . . . . [P]roviders are either independent contractors — self-employed business owners — or, in the case of a small number of . . . providers who are providing care in a child's home, [are] otherwise not in an employer-employee relationship under the federal labor relations laws.

. . .

> Even if . . . providers were considered employees under federal labor laws, however, the entities with which they would negotiate over key elements of their work — state and local governments — are not considered employers. They are expressly excluded from the definition of "employer" under the federal labor laws, and thus state and local public-sector employees . . . require specific legal authority in order to obtain collective bargaining rights with their government employer . . . .
>
> In other words, without additional, specific legal authority, home-based child care providers have no right to organize for the purpose of collective bargaining, and the state has no right to recognize or negotiate with the providers' representative.

Deborah Chalfie et al., *Getting Organized: Unionizing Home-based Child Care Providers* 6-7 (2007) (emphasis added).[5]

A review of the early efforts to organize home help providers will illustrate the practical and legal obstacles concomitant with organizing care providers, and will describe organized labor's strategy for overcoming those hurdles.

In 1985, the Service Employees International Union (SEIU) attempted to unionize all of the home

5. *Available at* http://goo.gl/DKj5Qg.

help providers in Chicago and portions of Cook County. The state labor board held providers were not public employees, stating:

> Embodied in . . . the Illinois Public Labor Relations Act (Act) . . . is a statement of the Act's fundamental purpose and this Board's resulting responsibility "to regulate labor relations between public employers and employees." An application of this Act to the relationship between [the state agency] and the service providers would render this purpose meaningless. The facts herein present us with a very unique situation which is virtually impossible for us to regulate. There is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (the service recipients).

State of Illinois Dep't of Cent. Mgmt. Serv. and Dep't of Rehab. Serv. and Serv. Employees Int'l Union, AFL-CIO, 1985 WL 1144994 (Ill. State Labor Relations Bd. Dec. 18, 1985).[6]

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6. Notwithstanding the 1985 state labor board ruling, years later Gov. Rod Blagojevich signed an executive order requiring state recognition of a union of home help providers under the Illinois Public Labor Relations Act. Ill. Exec. Order 2003-8 (Mar. 4, 2003). It is unclear whether an executive order could overcome an agency interpretation of a statute; nevertheless, the Illinois Legislature later codified the arrangement. Ill. Pub. Act 93-204 (the enactment Petitioners are challenging as unconstitutional).

In the 1980s, SEIU attempted to organize all the home help providers against the County of Los Angeles. When the county refused to meet and confer with SEIU as a bargaining agent, SEIU brought suit. The California Court of Appeals held that the home help providers were not employees under the controlling statute. *Serv. Employees Int'l Union v. Cnty. of Los Angeles*, 275 Cal. Rptr. 508 (Ct. App. 1990). In making its decision, the appellate court looked to the common law test of what constituted an employee-employer relationship and held no such relationship existed between the home help provider and the county. The court quoted the trial court decision with approval:

> The county exercises no supervisory control over providers. The manner in which the provider's tasks are performed is determined by the recipient, as are the hours when such services are performed. The provider is free to terminate his or her services without notice to the county; likewise, a recipient may discharge a provider at any time without notice to the county. If a provider is not performing satisfactorily the county has no right to intervene. Where the recipient's health or safety is endangered by such unsatisfactory performance, the county's only recourse is to place the recipient in an appropriate facility.

Id. at 511.

California labor organizers responded by formulating and effecting a three-part strategy to "engage in the structuring of a new sector of the workforce," which

included grassroots organizing, policy changes, and coalition building. Delp & Quan, *supra* at 5-6.

The SEIU's grassroots outreach illustrates obstacles organized labor navigated. A workforce of independent contractors serving private clients is naturally quite fragmented. The targeted workers in Los Angeles County spoke more than 100 languages and were scattered over 4,083 square miles. *Id.* at 2, 4. To simply identify the workers, organizers visited "senior citizens' centers, doctor's offices, markets, churches . . . [and] even dug in trash cans to find lists of workers." *Id.* at 6. The union also had to overcome the negative connotations of organizing, which could lead to "wage demands and strikes against elderly and disabled consumers." *Id.* at 5.

The SEIU also recognized the need to enact policy changes to create an "employer" common to the 74,000 home care providers in Los Angeles County. The union's political advocacy eventually led to the California Legislature enacting a statute that allowed counties to establish "by ordinance, a public authority to provide for the delivery of in-home supportive services." Cal. Welf. & Inst. Code § 12301.6(a)(2). This public authority would be deemed "the employer of in-home supportive services personnel [who were] referred to [HHP] recipients," although the recipients would "retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services to them." Cal. Welf. & Inst. Code § 12301.6(c)(1). The California Legislature subsequently passed legislation requiring each county to establish a public authority to act as an employer for home help providers by January 1, 2003. Cal. Welf. & Inst. Code § 12302.25(a).

Los Angeles County eventually created one of these entities and, in 1999, SEIU successfully organized against it. This one drive netted organized labor 74,000 additional members and was described as "[o]ne of the most significant gains in union membership in fifty years." David L. Gregory, *Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers*, 35 Fordham Urb. L.J. 277, 280 (2008).

Oregon was the next state to attempt the organization of home help providers. Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1406 (2008). A bill to create a statewide home care commission was introduced in the Oregon Legislature in 1999, but languished. *Id.* The Oregon Public Employees Union, an affiliate of SEIU, shifted tactics and gathered enough petition signatures from voters to place a proposed constitutional amendment on the ballot. *Id.* The measure was approved by 63 percent of the voters in November 2000. *See* Or. Const. art. XV, § 11. The measure created a home care commission to establish standards of care for "elderly and people with disabilities who receive personal care services in their homes by home care workers hired directly by the client and financed by payments from the State . . . ." *Id.* at § 11(1)(b)(A). The commission was designated "for purposes of collective bargaining" as "the employer of record of home care workers hired directly by the client and paid by the State[.]" *Id.* at § 11(3)(f). The first collective bargaining agreement, delayed by a state budget crisis, was finalized in 2003. Patrice M. Mareschal, *Innovation and Adaptation: Contrasting Efforts to Organize Home Care Workers in Four States*, 31 Lab. Stud. J. 25, 34 (2006).

In 2001, voters in Washington State approved a similar law through the initiative process, which in pertinent part is codified at Wash. Rev. Code § 74.39A.270. The initiative established a Home Care Quality Authority that bargained with SEIU, the union designated as the representative of some 26,000 home help providers. Mareschal, *supra* at 35. Under the law as initiated, the Legislature ratified any negotiated compensation increases for home help providers; should the Legislature reject or fail to act on the funding request the negotiations are reopened to secure funds necessary to implement the agreement. *Id.* at 36. The law was later modified to enable the home care union to negotiate directly with the Governor. The law states that the Governor is the public employer, and individual providers are public employees, "solely for the purposes of collective bargaining . . . ." Wash. Rev. Code § 74.39A.270(1). Home help recipients retained the right to select, hire, supervise, and terminate individual home help providers. Wash. Rev. Code § 74.39A.270(4).

In addition to California, Oregon, and Washington, six other states currently authorize the unionization of workers who provide home help to recipients of public assistance; these states authorize various public bodies or officers to actively bargain with those recipients. An examination of each state's arrangement reveals several features in common: (1) the creation of a public body to serve as an employer of record for bargaining purposes; (2) the state's disavowal of a true employment relationship with home help providers; and (3) reliance on the state's budgeting process for changes to the compensation of home help providers.

The Illinois statute at issue in the instant matter "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act" designated the State of Illinois as the public employer of personal assistants providing services through the state's Home Services Program. 20 Ill. Comp. Stat. 2405/3(f). The personal assistants are referred to as "public employees" but the statute explicitly constrains the employment relationship:

> The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits.

Id.

In Massachusetts, the Legislature passed a law that created the Personal Care Attendant Workforce Council within the executive office of Health and Human Services. Mass. Gen. Laws ch. 118E, § 71. The Council is designated as the employer of "personal care attendants," who are considered "public employees" for the purpose of state collective bargaining. Mass. Gen. Laws ch. 118E, § 73(b). The statute affirms the right of care recipients to "select, hire, schedule, train, direct, supervise and terminate any personal care attendant . . . ." Mass. Gen. Laws ch. 118E, § 73(a). Personal care attendants "shall not be considered public employees or state employees for any purpose" apart from collective bargaining and the care providers are not eligible for state employee benefits programs. Mass. Gen. Laws ch. 118E, § 73(b).

In 2007, Maryland Gov. Martin O'Malley issued an executive order authorizing home help providers directly reimbursed by the state through specified public assistance programs to collectively organize. Md. Exec. Order No. 01.01.2007.15 (Aug. 6, 2007). The order authorized providers to meet and confer with the state concerning reimbursement rates under the programs, payment procedures, and benefits. *Id.* at C. Any provisions of an agreement requiring legislative action were to be jointly presented to the legislative body. *Id.* Subsequently in 2011, the Maryland General Assembly codified the authorization for independent home help providers to bargain with the state. Md. Code Ann., Health-Gen. §§ 15-901, *et seq.* Any agreement that requires the appropriation of funds is "recommended" to the General Assembly for the appropriation. Md. Code Ann., State Pers. & Pens. § 3-501(d)(2). The law affirmed the right of program recipients to "select, direct, and terminate the services" of care providers. Md. Code Ann., Health-Gen. § 15-907.

In 2008, Missouri voters approved a measure titled "The Quality Home Care Act." Mo. Rev. Stat. §§ 208.850-871. The measure created the Missouri Quality Home Care Council and empowered the body to bargain collectively with a representative of home help providers (referred to as "personal care attendants" in statute). Mo. Rev. Stat. § 208.853. The Council is defined as a "public body" and personal care attendants are considered employees of the council for purposes of collective bargaining. Mo. Rev. Stat. § 208.862. The statute later states that these workers "shall not be considered employees of the state of Missouri or any vendor for any purpose." *Id.* The Council is empowered to "recommend" changes to personal care attendants' wages to the Missouri General Assembly. Mo. Rev. Stat. § 208.853.

In Connecticut, the relevant statute, adopted in 2012, creates the Personal Care Attendant Workforce Council, which negotiates with a statewide bargaining unit of "personal care attendants." Conn. Gen. Stat. § 17b-706a(e)(1). Personal care attendants "shall not be considered state employees" and are prohibited from utilizing state employee health benefits and pensions. Conn. Gen. Stat. § 17b-706b. Care recipients who receive state-funded services from a personal care attendant retain the right to "hire, refuse to hire, supervise, direct the activities of, or terminate the employment of any personal care attendant." Conn. Gen. Stat. § 17b-706a(e)(2)(A). Any agreement negotiated between the care attendants and the Council that requires the appropriation of funds is subject to the state's "regular budgetary approval process, subject to funds being made available and affirmative legislative approval." Conn. Gen. Stat. § 17b-706b(c)(8).

In 2013, the Vermont General Assembly authorized home help providers (referred to as "independent direct support providers") to bargain collectively with the state. Vt. Stat. Ann. tit. 21, §§ 1631-44. The providers were not to "be considered state employees for purposes other than collective bargaining." Vt. Stat. Ann. tit. 21, § 1640. A collective bargaining agreement under the statute may not infringe on the rights of care recipients to hire, supervise or terminate any care provider. *Id.* Any state funding pursuant to an agreement with unionized care providers depends entirely on the general assembly:

> If the State and the exclusive representative reach an agreement, the Governor shall request from the General Assembly an appropriation sufficient to fund the agreement in the next

> operating budget. If the General Assembly appropriates sufficient funds, the negotiated agreement shall become effective and binding at the beginning of the next fiscal year. If the General Assembly appropriates a different amount of funds, the terms of the agreement affected by that appropriation shall be renegotiated based on the amount of funds actually appropriated by the General Assembly and shall become effective and legally binding in the next fiscal year.

Vt. Stat. Ann. tit. 21, § 1639(a).

Over the last fifteen years, organized labor has continued to refine its approach to organizing home help providers. The unionization of these providers is unique in that privately employed individuals, who are compensated through needs-based government assistance programs, are organized collectively despite having no formal, professional affiliation with each other. Unions in several states have successfully organized these private individuals into a bargaining unit of "public employees" for the purpose of petitioning the state for changes to public assistance programs. This requires the creation of a "public employer" to bargain with the privately employed individuals. Negotiations between the care providers and the ostensible public employer are predicated on the ability to petition legislatures for necessary appropriations or changes in reimbursement rates.

This form of unionization stands in stark contrast to traditional collective bargaining arrangements, which consist of a labor representative negotiating with an

employer on behalf of employees of that employer. As one commentator writes: "The one-on-one character of [an in-home] care relationship — where an individual provider interacts with several [clients], but does so separately with each one — stands in sharp opposition to the vision of *collective* bargaining." Peggie R. Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 U. Kan. L. Rev. 321, 340 (2007) (emphasis in original).

The unionization of home help providers in Illinois is the first such arrangement to be considered by a federal appeals court. In the decision below, the Seventh Circuit held that homecare recipients and the State of Illinois are joint employer of Petitioners, as the state regulates the providers' industry and how much the providers are paid. Pet. App. 9a-11a. The Seventh Circuit extended the holding of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) to apply to personal assistants in the Illinois home-care Medicaid waiver program who are classified as state employees for the purposes of collective bargaining. Pet. App. 13a.

In *Abood*, this Court upheld the constitutionality of requiring public school teachers to finance expenditures by the union for collective bargaining, contract administration, and grievance adjustment purposes. The government's "important" interest in "labor peace" justified the "impingement upon associational freedom" of the public school teachers. *Id.* at 224-25.

The Seven Circuit clearly failed to appreciate the significant distinctions of individuals who are public employees, such as the school teachers in *Abood*, and

individuals who are partially compensated with money distributed by a public assistance program administered by the state. A discussion of the experience in Michigan will illuminate those distinctions.

II. Unionization of Privately Employed Workers Under Public-Sector Law in Michigan

As in the states described above, organized labor in Michigan sought to organize consumer-directed caregivers who are privately employed, though compensated through government assistance programs. Labor organizations in Michigan conducted two efforts to unionize such workers; first, home help providers similarly situated to Petitioners in the instant matter, and later with in-home child care providers.

Michigan, notably, is one of only a few states to authorize and implement the unionization of home help providers, only to later abandon the arrangement. The unionization of home help providers became heavily contested and resulted in intense public scrutiny due to litigation in state and federal courts, several legislative enactments and a proposed amendment to the state constitution. A discussion of the Michigan home help provider unionization and the subsequent repeal of the policy may provide relevant information to assist the Court.

A. Unionization of Home Help Providers

The Home Help Program is part of Medicaid, a needs-based federal program that is administered in Michigan by the Department of Human Services ("Mich.

DHS") and the Department of Community Health ("Mich. DCH"). Department of Community Health Audit of Home Help Program (Mar. 2005). The program provides unskilled care to Home Help Program recipients living independently:

> Home help services . . . are provided to enable functionally limited individuals to live independently and receive personal care services in the most preferred, least restrictive settings. Individuals or agencies provide [home help services]. The services that may be provided consist of unskilled, hands-on personal care for twelve activities of daily living (ADL), (eating, toileting, bathing, grooming, dressing, transferring, mobility) and instrumental activities of daily living (IADL), (taking medication, meal preparation and cleanup, shopping and errands, laundry, housework).

Id. at 1. According to a 2005 survey, 75 percent of home help providers began doing so because a family member or close friend was in need of care. Caroline M. Sallee, *The Role of MQCS and Home Help: Serving Michigan's Long-Term Care Population* 10, Anderson Economic Group (Dec. 13, 2011). In fiscal 2007 through 2010, the HHP served 48,205, 50,862, 52,082 and 53,516 care recipients, respectively. *Id.* at 15 (average monthly numbers of care recipients).

In April 2004, Mich. DCH and a local governmental entity entered into an interlocal agreement[7], which created the Michigan Quality Community Care Council (MQCCC), a new public body. Interlocal Agreement Between the Department of Community Health and the Tri-County Aging Consortium (Apr. 24, 2004).[8] The new interlocal agreement purported to give MQCCC the power to act as a public employer of home help providers throughout the state who provided assistance through the Home Help Program. The interlocal agreement empowered MQCCC to "bargain collectively and enter into agreements with labor organizations. [MQCCC] shall fulfill its responsibilities as a public employer . . . with respect to all its employees." *Id.* at § 6.11. While purporting to establish MQCCC as the public employer of home help providers, the interlocal agreement stated that consumers (that is, the recipients of home help care) held the "exclusive right to select, direct, and remove the Provider who renders Personal Assistance Services to that Consumer." *Id.* at § 6.03.

In January 2005, the MQCCC and SEIU petitioned the Michigan Employment Relations Commission (MERC) to become the collective bargaining agent for home help providers. The Commission oversees the certification process of unions representing public employees in the

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7. Under state law, interlocal agreements allow two or more local governmental entities to enter into contractual undertakings or agreements with one another or with the state for the joint administration of any functions or powers that each would have the power to perform separately. Mich. Const. 1963, art. 7, § 28; Mich. Comp. Laws §§ 124.501-512.

8. *Available at* http://goo.gl/lhZrho.

state of Michigan. Mich. Comp. Laws §§ 423.201 *et seq.* The SEIU and the MQCCC mutually consented that home help providers were public employees and that the Commission thereby had jurisdiction:[9]

> 6. The Parties acknowledge that MERC has jurisdiction over questions related to the representation of such employees[,] as the individuals are employees, as defined by the PERA, of the Michigan QCCC, a public body corporate[,] even though the individual persons receiving care retain authority over their personal selection and retention of particular homecare workers.

MQCCC and SEIU Addendum to Consent Election Agreement at 2.[10]

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9. The Commission's jurisdiction in this representation petition was questionable. It is axiomatic that parties cannot consent to a tribunal 's subject-matter jurisdiction where none exists. *Gonzales v. Thaler*, 132 S.Ct. 641, 648 (2012) ("Subject-matter jurisdiction can never be waived or forfeited."). The Commission would only possess jurisdiction if home help providers were, indeed, public employees. *Prisoners ' Labor Union v. Dep 't of Corrections*, 61 Mich. App. 328, 330 (1975) ("It is undisputed that [the Michigan Employment Relations Commission] has jurisdiction over the inmates ' claims if and only if those inmates are 'public employees ' within the meaning given that term in [the Public Employment Relations Act]."). A sua sponte determination of whether these people were public employees should have occurred before the Commission allowed a vote.

10. *Available at* http://goo.gl/0n4QKD.

The Commission conducted a vote and SEIU was certified as the collective bargaining agent for 41,000 home help providers in April 2005.[11]

One year later, in April 2006, the first purported collective bargaining agreement was adopted between MQCCC and SEIU. It indicated that consumers (care recipients) retained control over hiring and firing home help providers:

> The parties reaffirm that Home Help Consumers have the sole and undisputed right to: 1) hire Providers of their choice . . . ; 2) remove Providers from their service at will and for any reason; and 3) determine in advance and under all circumstances who can and cannot enter their home.
>
> The parties reiterate their prior acknowledgements that: the persons receiving service each, individually, retain control over the physical conditions at the work location and individually direct the performance of services and that such authority and control on the part of the individual consumers will not be, and is not, diminished in any way by this Agreement, nor by the outcome of any subsequent contractual negotiations between these parties.[12]

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11. Tabulation of Election Results, Case No. R05 A-008 (April 11, 2005), *available at* http://goo.gl/CjtPrb.

12. Collective Bargaining Agreement Between the Michigan Quality Community Care Council and SEIU, Local 79, 2006-2009 at 2, *available at* http://goo.gl/jJEJ6i.

The agreement allowed the union to collect dues and agency fees from home help providers. Union dues and agency fees were deducted from payments issued by the state to home help providers.[13]

Significantly, the MQCCC and the union admitted that their wage schedule of hourly compensation rates for home help providers was merely their request to the Legislature, and that the actual compensation would be determined by the legislative process:

> The following schedule of compensation improvements is premised on the proposed State Budget as presented by the Governor. The parties expressly understand that the proposed Budget, as presented, is subject to alteration. Therefore the compensation increases presented below are subject to change as the State Budget is finalized and adopted.[14]

A second collective bargaining agreement effective October 2009 to September 2012 was executed between MQCCC and SEIU Healthcare Michigan.[15] It maintained the language regarding consumer control of hiring, firing, and control over the premises. The compensation remained substantively the same, but was changed to read: "The parties agree that the 2009/10 wage improvements will be determined by the 2009/10 State budget."[16]

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13. *Id.* at 5-6.

14. *Id.* at 7.

15. Collective Bargaining Agreement Between the Michigan Quality Community Care Council and SEIU Healthcare Michigan, 2009-2012, *available at* http://goo.gl/aisrpg.

16. *Id.* at 9.

Collection of the purported "dues" paid by home help providers first began in November 2006. As of March 29, 2012, the Mich. DCH had transferred $31,317,790.40 to the union as dues/agency fees.[17] This sum represents around $480,000 per month.

B. Unionization of Home-Based Child Care Providers

Another attempt in Michigan to organize private workers under the auspices of public-sector collective bargaining laws involved home-based child care providers. As with the home help workers, organized labor perceived the receipt of state assistance as creating a new labor market and began organizing against the money.

Michigan receives a federal Temporary-Assistance-for-Needy-Families block grant, which is administered by Mich. DHS. Some Michigan parents receive a subsidy from the state for child care. In most cases, the Mich. DHS subsidy is less than the full cost of child care, and families are responsible for paying the difference between the subsidy and the cost of the provider.[18] The child care subsidy is directed to the child care providers from the state.

Labor organizations recognized an opportunity to capture new revenue from the subsidy payments transferred from the Mich. DHS to self-employed child

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17. FOIA response to the Mackinac Center for Public Policy (Apr. 3, 2012) *available at* http://goo.gl/UszXZM.

18. *Income Eligibility Chart*, Department of Human Services, http://goo.gl/V644pP (last visited Nov. 26, 2013).

care providers. A union called Child Care Providers Together Michigan (CCPTM) — a joint enterprise of the United Auto Workers and the American Federation of State, County and Municipal Employees — was created for this purpose.

In July 2006, the Mich. DHS and a community college entered into an interlocal agreement, creating the Michigan Home Based Child Care Council (MHBCCC).[19] That agreement defined a "provider" as including one "who receives payments for providing home-based child care services through the Department."[20] The parties clarified that "[i]t is not the purpose of this Agreement to limit the selection process of child care providers by families; families will continue to select and retain the provider who best suits their needs."[21] The agreement also professed to give the MHBCCC the "right to bargain collectively and enter into agreements with labor organizations. [MHBCCC] shall fulfill its responsibilities as a public employer ...."[22]

In September 2006, CCPTM filed a petition for representation proceedings with the Michigan Employment Relations Commission, seeking to unionize

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19. Interlocal Agreement between Mich. Dep 't of Human Serv. and Mott Cmty. College (July 27, 2006), *available at* http://goo.gl/4Kmcgk.

20. *Id.* at § 1.15.

21. *Id.* at § 2.01.

22. *Id.* at § 6.10.

against the MHBCCC.[23] In its petition, the CCPTM stated that the bargaining unit included more than 40,000 home-based child care providers who provide services under the Michigan Child Development and Care Program.[24] MERC ran a certification election by mail and CCPTM was certified as the bargaining representative.[25]

The MHBCCC and CCPTM entered into a collective bargaining agreement in 2008. Collective Bargaining Agreement between MHBCCC and CCPTM (effective Jan. 1, 2008).[26] The preamble to the agreement recognizes its distinctive nature:

> This agreement formalizes the unique relationship between the MHBCCC and the CCPTM . . . .
>
> CCPTM and MHBCCC recognize that the implementation of various provisions in this Agreement will necessarily require the assistance and cooperation of entities that are not a party to this Agreement, primarily the Department of Human Services. CCPTM and MHBCCC agree to work together in good

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23. Petition for Representation Proceedings, No. R06 I-106 (Sept. 8, 2006), *available at* http://goo.gl/6ySzpg. As with home help providers, the Michigan Employment Relations Commission failed to question its jurisdiction over home child care providers.

24. *Id.*

25. Tabulation of Election Results, Case No. R06 I-106 (Nov. 14, 2006) *available at* http://goo.gl/f5okXH.

26. *Available at* http://goo.gl/yUNNWj.

> faith in order to secure the assistance and cooperation of the appropriate entities when required by the provisions of this Agreement.

Id. at 3. The parties indicated the unique arrangement did not constitute a traditional employee-employer relationship between CCPTM and MHBCCC, as the agreement stated that "parents have the sole and undisputed authority to: 1) hire Providers of their choice; and 2) remove Providers from their service at will for any reason." *Id.* at 14.

The union and "employer" were not empowered to mutually agree to terms of compensation for the home-based day care providers; the agreement recognized that the parties were dependent upon the Legislature to fund any agreement reached:

> Although the parties understand that economic increases are largely contingent upon necessary legislative funding, MHBCCC agree to work jointly with CCPTM to find creative solutions to fund economic increases when new funds are insufficient.
>
> The MHBCCC, in agreement with the Union, will recommend to the Governor to make the necessary budget recommendations to the Legislature for Home Based Child Care Providers as outlined in Appendix B — Rates. And in addition, will provide the necessary political support to make effective the economic increases in this agreement.

Id. at 26. If the Michigan Legislature did not provide the requested funding, the parties are to meet to determine how to proceed. *Id.*

The MHBCCC and the CCPTM agreed "union dues" were to come from the child care subsidy payments:

> Deductions of Union dues shall begin no later than thirty (30) days from the first date for which a provider received subsidized payment.
>
> . . .
>
> Union dues and initiation fees shall be deducted from the Provider's payments and remitted to the Union . . . . The warrant stub will state "Union Dues" and the amount of the deduction . . . .

Id. at 9, 15. The collective bargaining agreement defined "providers" as those day care providers who were licensed, registered, or enrolled and receiving subsidy payments. *Id.* at 5. Thus, according to the document's terms, a home-based day care provider was covered by the collective bargaining agreement only when receiving payment through state subsidies.

C. Dissolution of Home-Based Child Care Providers' Unionization

The unionization of Michigan home-based child care providers prompted two high-profile lawsuits challenging the arrangement in 2009.[27]

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27. A petition for writ of certiorari in one of these matters is currently pending before this Court. *Schlaud v. UAW*, 717 F.3d 451 (6th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3101 (U.S. Aug. 19, 2013) (No. 13-240).

These two matters generated significant public awareness and news coverage of the unionization of private day care providers. In March 2011, newly appointed Mich. DHS Director Maura D. Corrigan announced the department had dissolved the agreement with the MHBCCC and would no longer fund it or collect so-called union dues from home-based child care providers, stating unequivocally that home-based day care providers are not state employees.[28] This action essentially ended the unionization of home-based day care providers. No litigation ensued over this administrative action.

D. Dissolution of Home Help Providers' Unionization

The unionization of home help providers who care for disabled adults also attracted significant public attention. The Michigan Legislature responded by defunding MQCCC, the "public employer" of home help providers, for fiscal year 2011-12. Rather than shutting down, the MQCCC stayed afloat by obtaining funding from nongovernmental sources, including SEIU.[29] On April 9, 2012, the MQCCC and SEIU agreed to an extension of the collective bargaining agreement, extending its terms until February 2013.[30]

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28. Press Release, *Michigan Department of Human Services, Mott Community College Dissolve Agreement That Created Michigan Home Based Child Care Council*, Mich. Dep 't of Human Serv. (Mar. 1, 2011), http://goo.gl/Qg3ECw.

29. Assorted Documents Related to SEIU $12,000 Provision to MQCCC, Mackinac Center (last viewed Nov. 25, 2013), http://goo.gl/6hXfqs.

30. Contract Extension Between MQCCC and SEIU (Apr. 9, 2012), *available at* http://goo.gl/pnLT5K.

The Michigan Legislature twice amended the statutory definition of "public employee" in 2012. The first revision was Public Act 45 of 2012, which amended Mich. Comp. Laws § 423.201(1)(e) to indicate that no one could be classified as a government agency employee who did not qualify as an employee of that agency under a 20-factor Internal Revenue Service employment test.

Subsequently, the Michigan Legislature passed Public Act 76 of 2012, which amended the statutory definition of "public employee" to clarify that those who receive "a direct or indirect government subsidy in his or her private employment" are not public employees. Mich. Comp. Laws § 423.201(1)(e)(i). These revisions indicated rejection of organized labor's new public employment theory that indirect recipients of state subsidies were public employees subject to unionization.

Even with the passage of Public Acts 45 and 76, the Mich. DCH did not stop processing the so-called "dues" and "fees" in question. The practice was temporarily halted after an informal legal opinion from the Michigan Attorney General indicated that the enactment of Public Act 76 should terminate the withdrawals. Letter from Richard A. Bandstra, Chief Legal Counsel, Michigan Attorney General, to Rep. Paul E. Opsommer, Michigan House of Representatives (May 24, 2012).[31]

In early 2012, SEIU undertook two actions to extend its ability to represent home help workers by: initiating a proposed constitutional amendment; and suing over the Legislature's enactments.

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31. *Available at* http://goo.gl/7MO7sv.

The proposed constitutional amendment was initiated by a group called Citizens for Affordable Quality Home Care (a coalition consisting of SEIU and government aid program advocates), to be placed on the statewide November 2012 ballot.[32] The proposed amendment, Proposal 12-4, would have amended the Michigan Constitution by creating a new public body within the executive branch of state government and would have authorized that body to bargain collectively with in-home care givers. Pursuant to the amendment, the new public body would have assumed the duties and obligations of the MQCCC, including honoring its unexpired bargaining agreements.

In May 2012, SEIU filed a federal lawsuit against Gov. Richard Snyder and other state officials. *SEIU Healthcare Michigan v. Snyder*, Case No. 12-cv-12332 (E.D. Mich. 2012). The primary issue addressed was whether enforcement of Public Act 76 of 2012 constituted an impairment of a contract — the collective bargaining agreement with its extension until February 2013 — under U.S. Const., art I, § 10. The SEIU stressed its political interests when arguing for a continuation of the dues withholdings: "Any delay in receiving those funds will be ruinous for the Union, which will have to lay off a significant portion of its staff and will be unable to represent the providers and to protect their interests, whether in collective bargaining, in upcoming legislative matters, during the impending general election, or otherwise[.]" (emphasis added). Supplemental Br. in Supp.

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32. Full Text of Proposed Constitutional Amendment Proposal 12-4, Michigan Secretary of State, *available at* http://goo.gl/Lnsr0P.

of Pl.'s Mot. for Prelim. Inj., *SEIU Healthcare Michigan v. Snyder*, Case No. 12-cv-12332 (E.D. Mich. 2012).[33] In June 2012, Judge Nancy G. Edmunds issued an Opinion and Order granting the union a temporary restraining order and preliminary injunction that required that the Mich. DCH continue deducting union dues and agency fees until February 28, 2013, the termination date of the contract extension.

In November 2012, Michigan voters defeated Proposal 12-4, which would have amended the constitution to authorize collective bargaining for home help providers, by a 56-44 margin.[34]

In December 2012, the MQCCC board announced that its contract with SEIU would end Feb. 28, 2013. The board further announced that the MQCCC would officially be dissolved as of April 14, 2013.[35]

The Michigan experience shows that the relationship between the "employer" of home help providers and the providers themselves lacked the indicia of a true employment relationship. The public employer was not responsible for hiring providers, placing providers with care recipients, supervising, directing or terminating the providers. The employer had no oversight of providers

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33. *Available at* http://goo.gl/7Ujim.

34. 2012 Official Michigan General Election Results, Michigan Secretary of State (Jan. 4, 2013 3:09 PM), http://goo.gl/UpIdJn.

35. Jack Spencer, *SEIU 'Dues Skim' Days Are Numbered*, Michigan Capitol Confidential (Dec. 18, 2012), http://goo.gl/FJ4NkB.

on the premises of a place of employment. Apart from a compelled association for the purpose of petitioning the Legislature for changes in compensation, home help providers were not considered public employees. Michigan's experiment with the unionization of in-home care provider resulted in the transfer of tens of millions of dollars from care providers and their needy clients to a special interest group that, when pressed, stressed its reliance on the arrangement for political and legislative gains.

III. The Compelled Association of Home Help Providers, Who Are Not Public Employees, Cannot be Justified by the State's Interest in Labor Peace Among Its Employees

A detailed examination of one state's experiment with compelled unionization of home help providers, as well as a review of similar programs in other states, demonstrates that these arrangements share consistent attributes: the classification of private caregivers as public employees for the sole purpose of collective bargaining and the lack of "employer" control over the hiring, supervision or termination of home help providers.

The strategic importance of the new labor market of home help providers is evident. Organized labor's membership losses in the private sector have necessitated the identification of new "public sector" employees to organize. Home-based care providers who receive some or all of their compensation through state assistance programs represent one such opportunity. In fact, home care workers have served as a lifeline for organized labor, with some of most significant membership gains occurring

in that sector. SEIU's successful 1999 effort to organize 74,000 home care workers in Los Angeles was described as the "largest union victory in the United States since 1941[.]" Smith, *supra*, 55 U. Kan. L. Rev. at 360. The unionization of 49,000 home-based child care providers in Illinois in 2005 was the second largest organizing drive since 1941. *Id.* at 363. As noted above, Michigan provided 40,000 home help providers upon initial unionization.

As discussed above, the Seventh Circuit extended this Court's holding in *Abood* to workers who provide homecare services through a public assistance program. The Seventh Circuit, however, absolved the State of Illinois of the burden of demonstrating a compelling interest that would justify the impingement of the associational and expressive rights of home help providers.

This Court has recognized that "government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). Similarly, the freedom of individuals to associate (or not to associate) is protected. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Closely related to compelled speech and compelled association is "compelled funding of the speech of other private speakers or groups." *Knox*, 132 S. Ct. at 2288. Infringements on the right of association must serve "compelling state interests" that cannot be achieved through "significantly" less restrictive means. *Roberts*, 468 U.S. at 623.

This Court has repeatedly acknowledged that compelling a worker to financially support a union as a condition of employment is a "significant impingement on

First Amendment rights." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 466 U.S. 435, 455 (1984). Nevertheless, the decisions of this Court have tolerated the impingement in order to further the interest in "labor peace." *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302-03 (1986).

Two years ago this Court observed that permitting unions to collect fees from nonmembers in order to eliminate "free-riders" and to further labor peace is "an anomaly." *Knox*, 132 S. Ct. at 2290. Yet the Seventh Circuit relies on the labor peace justification to extend *Abood* to workers who are not employees of the State of Illinois. The home help workers affected by this policy interact with the state in the delivery of homecare assistance to Medicaid recipients, but the Seventh Circuit's novel theory of joint employment falls apart when the details of unionization in Illinois and other states are reviewed.

Organized labor's new initiative to organize the home help providers is a "strategic intervention of the union in the formation of a new labor market," which is designed to establish "a new form of industrial relations." Delp & Quan, *supra* at 18. In their current form, these arrangements are unconstitutional in that they impinge on the home help providers' First Amendment rights.

CONCLUSION

For the reasons stated above the Seventh Circuit's judgment should be reversed.

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AMICUS CURIAE BRIEF

No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION, CALIFORNIA TEACHERS ASSOCIATION AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is submitted on behalf of the National Education Association ("NEA"), the California Teachers Association ("CTA") and Change to Win.[1]

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges and universities. CTA is NEA's state affiliate in California, with approximately 300,000 members. NEA affiliates have collective bargaining agreements with more than 10,000 school districts, including more than 900 districts that have agreements with affiliates of CTA. Most of these agreements provide for agency fees.

NEA, CTA and several of their local affiliates are defendants in *Friedrichs v. California Teachers Association*, on appeal to the Ninth Circuit (No. 13-57095), which challenges a California law allowing school districts to enter into agency shop arrangements. Styling themselves the "California Public-School Teachers," the *Friedrichs* Plaintiffs have submitted an *amicus* brief in this case (the "Nonunion Teachers Br.").

Change to Win is a labor federation of three national and international labor unions—the International Brotherhood of Teamsters, the Service Employees International Union and the United Farm Workers of

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[1] Blanket consents from all parties for the filing of *amicus* briefs are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

America—which collectively represent approximately 3.5 million working men and women throughout the United States. Among the workers represented by Change to Win affiliates are hundreds of thousands employed by state and local governments throughout the country. Change to Win affiliates have collective bargaining agreements with several thousand state and local governments, most of which provide for agency fees.

Because petitioners and their *amici* ask this Court to hold that public employee agency shop arrangements are unconstitutional, NEA, CTA and Change to Win have a substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

Principles of federalism command respect for a State's decision to manage its personnel relations through a system of collective bargaining with an exclusive representative chosen by a majority of the affected employees and to require all employees to pay a share of the costs of representation. That the First Amendment does not deny a State that right is established by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which has been followed by this Court, both as to its result and its reasoning, in numerous subsequent decisions.

The critiques of *Abood* that are advanced by petitioners and their *amici* lack merit.

Properly understood, collective bargaining is not a "petition for redress of grievances." And if it were, for a State to bargain with an exclusive representative does not deprive employees of any right to petition the government they otherwise could exercise.

Nor does exclusive representation impair freedom of association. Employment necessarily requires association. A government employer's decision to set terms and conditions of employment through collective bargaining with an exclusive representative, in furtherance of its interests as a proprietor, does not coerce association in violation of the First Amendment, where employees are not required to join the union, attend meetings or otherwise act in concert with the union, and their ability to convey their own messages on any subject is not restricted.

In some cases an exclusive bargaining representative may pursue objectives in collective bargaining to which a particular employee is opposed – although petitioners have not alleged that here. But an agency fee requirement does not force such an employee to subsidize speech to which he is opposed. Collective bargaining and contract administration are economic *activities*, as to which employees are charged a fee not to support what a union *says*, but to contribute toward what collective bargaining *produces* – an enforceable agreement from which all employees benefit.

If an agency shop nevertheless were considered to involve compelled subsidization of speech, there still would be no basis for strict scrutiny. In other "compelled subsidization" cases, the Court has required only that the private speech be connected to a legitimate government purpose. And, where the government is acting as *employer*, pursuing its proprietary interests in managing its operations, strict scrutiny is all the more out of place.

ARGUMENT

I. UNDER THE APPROACH THIS COURT CONSISTENTLY HAS TAKEN TO FINANCIAL SUPPORT OF COLLECTIVE ECONOMIC ACTIVITY, THE FIRST AMENDMENT DOES NOT PREVENT A STATE FROM SETTING TERMS AND CONDITIONS OF EMPLOYMENT BY AGREEMENT WITH AN EXCLUSIVE REPRESENTATIVE AND REQUIRING ALL EMPLOYEES TO PAY A SHARE OF THE COSTS OF REPRESENTATION

The decision of a state or local government to authorize a system of collective bargaining with an exclusive representative selected by a majority of the affected workforce is a decision made by the government as a proprietor, managing its internal operations. Principles of federalism counsel against denying state and local governments the right to make that choice. This Court held in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that the First Amendment does not foreclose this choice. *Abood's* holding has consistently been followed, and its reasoning reaffirmed, in the context of exclusive representation for collective bargaining and in numerous other contexts as well. Reconsideration of this settled body of law is not warranted.

A. Principles of Federalism Counsel Against Countermanding a State's Choice to Adopt a Personnel System that Provides for Collective Bargaining With An Exclusive Representative Chosen By a Majority of Affected Employees.

1. A public employer is nonetheless an employer. A public school, hospital or transit system – no less

than a private school, hospital or transit system – must hire, train, manage, discipline and retain a skilled workforce, and must provide compensation that is fair and competitive.

As with many challenges that face state or local governments, "considerable disagreement exists about how best to accomplish th[ose] goal[s]." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Some jurisdictions have opted to make all personnel decisions unilaterally, in part by *ad hoc* decisionmaking and in part by prescriptive lawmaking in the form of statutes and regulations. But other jurisdictions have made the judgment that there are advantages to public employers, as well as to employees, in a system under which terms and conditions of employment are the product of agreement rather than fiat. In these fundamental differences of approach to personnel relations, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.*

A government may reasonably determine that a system of collective bargaining with an exclusive representative chosen by a majority of the employees in an appropriate unit offers the best way to conduct its personnel relations. That "'principle of majority rule' . . . is in fact the central premise" of the National Labor Relations Act. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009) (quoting *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975)). Congress enacted that statute with the understanding that "it is practically impossible to apply two or more sets

of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, [and therefore] the making of agreements is impracticable in the absence of majority rule." Sen. Rep. No. 573, 2 Leg. Hist. of the NLRA 2313 (1935). And Congress observed that, "by long experience, majority rule has been discovered best for employers as well as employees." *Id.*

Many States have made a similar judgment with respect to the management of their own workforces. For example, in 1996, the Maryland Department of Labor, Licensing and Regulation issued a report "to review policy issues and policy options pertinent to the introduction of comprehensive legislation to authorize collective bargaining for Maryland public employees." Maryland Dept. of Labor, Licensing and Regulation, *Collective Bargaining for Maryland Public Employees: A Review of Policy Issues and Options* 1 (Jan. 1996) (copy lodged with the Clerk). The report cited analyses in which "increase[d] worker involvement in decision making" was both "seen as a worthy end in itself" and "viewed as crucial to achieving the [employer's] larger economic goals," such that "many managers, labor leaders, and government officials have come to believe that tapping worker knowledge and energy is the key to overcoming our problems of competitiveness." *Id.* at 27-28 (quoting Adrienne Eaton and Paula Voos, "Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation," in Lawrence Michel and Paula Voos, eds., *Unions and Economic Competitiveness* 173 (1992)). The report extolled the value of "public sector participatory management" aimed at "forging an effective partnership between labor and

management so as to achieve public goals more effectively and efficiently," with collective bargaining serving as "a positive instrument" to that end. *Id.* at 1-2. It cited studies showing positive impacts on productivity, job performance and accountability stemming from public sector bargaining. *Id.* at 28-31.

Similar conclusions were reached by the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor Management Corporation, in its report entitled *Working Together for Public Service* (1996) (available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1254&context=key_workplace). Citing dozens of instances where collective bargaining in the public sector resulted in "better service," "more cost-effectiveness," and "better quality of work life," as well as "improved labor-management relations," *id.* at 2, the report concluded that "collective bargaining relationships, applied in cooperative, service-oriented ways, provide the most consistently valuable structure for beginning and sustaining a workplace partnership with effective service results." *Id.* at 70.

More than two-thirds of the States have chosen to authorize a system of exclusive representation for collective bargaining, reasonably believing, among other things, that this will enhance employee morale and commitment, enable the employer better to ascertain employee needs and priorities so that compensation dollars will be best spent, and provide the most effective means of bringing the expertise of the workforce to bear on improving the delivery of services to the public. Exclusive representation also enables public employers to fashion grievance arbitration systems through which employee disputes can be resolved fairly and expeditiously, with decision-

making authority lodged in a union charged to act in the best interests of the unit as a whole, consistent with its duty of fair representation "on which the employer with whom it bargains may rely." *Bowen v. U. S. Postal Serv.*, 459 U.S. 212, 226 (1983).

2. Whether to authorize a system of collective bargaining is a decision made by a government "as proprietor, to manage [its] internal operation," *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)), exercising "the extra power" that "comes from the nature of the government's mission as employer," *id.* (quoting *Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) (plurality opinion)). The choice a State makes is based on its own circumstances and what it sees as the best way to conduct its personnel relations, with each state determining which agencies and instrumentalities should be authorized to engage in collective bargaining[2] and which subjects should be included in or excluded from the process.[3]

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[2] Some States have comprehensive statutory collective bargaining regimes that apply broadly to most of the States' own employees as well as to employees of the States' agencies and political subdivisions. *See, e.g.*, Alaska Stat. Ann. §§ 23.40.070-23.40.260; Ohio Rev. Code Ann. §§ 4117.01-4117.23. Other States have specific statutory regimes that apply to particular classes of public employees, such as teachers (*e.g.*, Ind. Code §§ 20-29-1-1-20-29-9-5), police (*e.g.*, Ky. Rev. Stat. § 78.470), firefighters (*e.g.*, Wyo. Stat. Ann. §§ 27-10-101-27-10-109), or state employees (*e.g.*, Neb. Rev. Code §§ 81-1369-81-1388).

[3] Public sector bargaining statutes and ordinances that define the scope of bargaining, and the administrative and judicial decisions applying these statutes and ordinances, vary from jurisdiction to jurisdiction. *See generally* Harry T. Edwards,

"Both federalism and separation-of-powers concerns would be implicated," *Minn. State Bd. v. Knight*, 465 U.S.

The Emerging Duty to Bargain in the Public Sector, 71 Mich. L. Rev. 885, 909-10 (1973). In addition, in some jurisdictions, certain subjects that might otherwise fall within the scope of collective bargaining are addressed by specific statutes that leave no room for bargaining. For example, Indiana's statutory regime for teacher collective bargaining provides for mandatory bargaining over salary, wages and related fringe benefits, *see* Ind. Code § 20-29-6-4-(a), but expressly prohibits bargaining over the criteria for selecting teachers to be laid off in the event of a reduction in force, *see id.* 20-28-7.5-1(d). Increasingly, jurisdictions have concluded that certain subjects are best addressed through an approach that provides a role both for collective bargaining and for other processes. For example, in response to the U.S. Department of Education's "Race to the Top" initiative, several States have enacted legislation that establishes criteria and procedures for teacher evaluation and dismissal but provides a role for collective bargaining in their refinement and implementation. *See, e.g.*, Ill. Pub. Act 96-861 (Jan. 15, 2010) (prescribing minimum standards for incorporating "data and indicators on student growth as a significant factor in rating teacher performances", but allowing specific implementation of those standards to be accomplished through collective bargaining); Ill. Pub. Act 97-8, § 5 (June 13, 2011) (prescribing minimum standards for alternative teacher dismissal procedures but allowing for more rapid development and implementation of such procedures through collective bargaining); N.Y. Educ. Law § 3012-c (mandating that teacher evaluations include "locally selected measures of student achievement" that are developed through collective bargaining but must comport with certain minimum requirements set by regulation); 2010 Md. Laws Ch. 189, § 1 (May 4, 2010) (allowing for collective bargaining over performance evaluation criteria that include "data on student growth as a significant component of the evaluation," but requiring implementation of a default "model performance evaluation criteria" in the event that "a local school system and the exclusive employee representative fail to mutually agree" on negotiated criteria).

271, 285 (1984), by any doctrine that would override these decisions made by the several states as employers. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (in challenges to decisions made by a state government in the management of its own affairs, "[r]estraint . . . is also counseled by considerations of state sovereignty").

B. The Constitutionality of the Public Sector Agency Shop is Firmly Established by Precedent That Has Repeatedly Been Reaffirmed By This Court in the Union Context and Elsewhere.

A government that authorizes collective bargaining with an exclusive representative necessarily must consider how the expenses that flow from the representative's "great responsibilities," *Abood*, 431 U.S. at 221, will be met. As the Court recognized in *Abood*, *id.*:

> The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money . . . . The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees . . . , union and nonunion,' within the relevant unit.

Collective bargaining by an exclusive representative could not successfully serve the "important government interests," *id.* at 225, for which it has been authorized if the exclusive representative were not adequately funded; and, if employees were free to share in the benefits of the representative's efforts at no

charge, adequate funding obviously would be imperiled. It therefore is common for a public employer to require all members of a bargaining unit to contribute to the costs of representation.

Abood held this to be constitutional "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment," *id.* at 225-26, so as "to distribute fairly the cost of these activities among those who benefit, and [to] counteract[ ] the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees," *id.* at 222. At the same time, *Abood* held that objecting nonunion employees cannot be required to provide financial support "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." *Id.* at 235.

In its numerous subsequent decisions involving exclusive representation for collective bargaining, this Court has adhered to *Abood's* holding.[4] In *Lehnert*, the

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[4] *See Locke v. Karass*, 555 U.S. 207, 210, 213 (2009); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 873 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516-21, 524-25 (1991); *id* at 552-53, 556-57; (Scalia, J., concurring in the judgment in part and dissenting in part); *Chi. Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 301-02 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 447, 456-59 (1984); *Minnesota State Bd. v. Knight*, 465 U.S. 271, 278, 290-92 (1984); *id.* at 299-300 (Brennan, J., dissenting); *id.* at 315-16 (Stevens J; dissenting); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50 (1983).

permissibility of the public sector agency shop was reaffirmed both in the opinion of the Court, 500 U.S. at 516-18, and in Justice Scalia's separate opinion, *id.* at 556 (Scalia, J., concurring and dissenting). Justice Scalia explained that the Court's "First Amendment jurisprudence . . . recognizes" that, although the government cannot ordinarily compel support for a private entity, "th[e] constitutional rule" allowing for mandatory support for an exclusive bargaining representative is "justifie[d]" by the union's "distinctive" duty as the statutory representative of all members of a bargaining unit. *Id.* So too in *Locke*, decided four years ago, the Court was unanimous in recognizing that the constitutionality of requiring "both public sector and private sector employees" to "pay a service fee to the local union that acts as their exclusive bargaining agent" is established as a "general First Amendment principle." 555 U.S. at 209, 213.

Abood also has been the source of the First Amendment analysis this Court has applied in other contexts where individuals are required to support activities undertaken in furtherance of "an otherwise proper goal requiring ... cooperative activity." *United States v. United Foods*, 533 U.S. 405, 414 (2001). In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court relied on *Abood* in upholding mandatory bar dues – although the Court found the question to be closer than in *Abood*, because "[t]he members of the State Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management." *Id.* at 12. *See also Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S 217, 231 (2000) ("The principles outlined in *Abood* provided the foundation for our later decision in *Keller*.") And, in cases involving generic advertising of agricultural products, the Court has relied on *Abood*

in holding that growers can be required to support such advertising where it is "'germane' to a 'broader regulatory scheme'" involving collectivized production and marketing. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (quoting *United Foods*, 533 U.S. at 413, 415-16). *See also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

In *Knox v. Service Employees International Union*, 132 S. Ct. 2277, 2290 (2012), the Court stated in *dictum* that "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly." And so it does, at the highest level of generality, because other organizations that provide benefits to nonmembers generally are not enabled by law to collect fees from those nonmembers. *Id.* But as the Court stated in *Knox*, this "anomaly" has been "found to be justified." *Id.* The *Knox* Court did not take issue with that proposition, or with the explanation offered by Justice Scalia in *Lehnert* as to why this apparent anomaly is "justified" by "[w]hat is distinctive about the 'free riders' who are nonunion members of the union's own bargaining unit," namely, that "*they* are free riders whom the law *requires* the union to carry – indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring and dissenting) (emphasis in original).

Petitioners and their *amici* nevertheless ask this Court to overrule *Abood*, declaring that *Abood* and its progeny "failed to give adequate recognition to First Amendment rights." Brief for Petitioners ("Pet. Br.") at 18. There is no reason for the Court to reconsider the long-established and oft-reaffirmed holding of *Abood* –

least of all in this case, where the contention that *Abood* should be overruled was not asserted in the courts below or in the petition for certiorari. But, however the issues may be framed, it is important to be clear that *Abood* did *not* fail to give "adequate recognition to First Amendment rights." Rather, as we explain in what follows, the arguments advanced by petitioners and their *amici* regarding what they believe the Court failed to "recogni[ze]" in *Abood* are contrary to this Court's First Amendment jurisprudence both as it stood when *Abood* was decided and as it stands today.

II. ABOOD WAS RIGHTLY DECIDED, AND THE ATTACKS ON THE DECISION BY PETITIONERS AND THEIR *AMICI* LACK MERIT

Attempting to portray *Abood* as out of step with this Court's First Amendment jurisprudence, petitioners and their *amici* refer only in passing to the several cases, noted above, that have addressed mandatory support for collective activities, all of which follow and support *Abood*. *See supra* at 11-13. Instead, petitioners and their *amici* rely on various decisions from further afield. In so doing, at every turn they mischaracterize and exaggerate the purported effect of an agency shop on First Amendment interests, and fail to acknowledge the deference that is owed to a state or local government when, in its proprietary capacity, it makes judgments as to how best to manage its workforce.

A. An Agency Shop Does Not Deprive Employees of Any Right to Petition the Government They Otherwise Could Exercise.

Petitioners and their *amici* assert that exclusive representation deprives employees of rights to "peti-

tion the government" they otherwise could exercise. *See* Pet. Br. at 30-31; Nonunion Teachers Br. at 17-18. That is not the case.

1. Even if a demand "addressed to the government in its capacity as the petitioners' employer," *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2506 (2011) (Scalia, J., concurring and dissenting), could in some instances constitute a First Amendment "petition for redress of grievances," *but see id.*, petitioners do not explain why collective bargaining – a process to forge, by give and take, a contract setting economic terms and imposing commitments on both the employer and the union – should constitute a First Amendment "petition," unless every proposal by a prospective government contractor is to be so considered.

But, even assuming *arguendo* that collective bargaining is "petitioning" for First Amendment purposes, there still is no substance to the suggestion that an agency shop deprives nonmember employees of rights to petition the government that otherwise would exist. Public employees "have no constitutional right to force the government to listen to their views," *Knight*, 465 U.S. at 283, any more than a *union* has a constitutional right to force the government to listen to *its* views. *See Smith v. Ark. State Highway Employees*, 441 U.S. 463, 465 (1979). Rather, in conducting its business as an employer, "[a]bsent statutory restrictions, the state must be free to consult or not to consult whenever it pleases." *Knight*, 465 U.S. at 285. *See also Borough of Duryea*, 131 S. Ct. at 2495-2500 (assuming collective bargaining processes are "petitioning" activities, an employee's "petitioning" interests are subordinate to the government's interests in the efficiency of its personnel operations). And in exercising that discretion, it has not been the

practice of Illinois, or of the states generally, to engage in bargaining with individual employees. Indeed, petitioners do not allege that, prior to the advent of the exclusive representation system, Illinois bargained with them individually over their wages or anything else.

2. At the same time, notwithstanding the absence of any right to *bargain* with their employer, "[i]ndividual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace." *Lehnert*, 500 U.S. at 521. Both where collective bargaining is in force and where it is not, governments often provide that final decisions regarding terms and conditions of public employment will be made through procedures in which the public, including individual employees, may participate. "The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities." *Abood*, 431 U.S. at 236. To the extent that legislative or administrative action is required to give effect to a collective bargaining agreement, an employee who opposes a union's contract demands may "communicate those views directly to the very decisionmaking body charged by law with making the choices raised by the contract . . . demands." *City of Madison v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 176 n.10 (1976).

Thus "the principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about government decisions concerning labor relations." *Abood*, 431 U.S. at 230. Notwithstanding the rhetoric in their brief, petitioners do not allege that

they have been muzzled in any respect. *See* Pet. App. 30a ("[T]he Complaint is bereft of any allegation that the Plaintiffs are prevented from independently lobbying the State for any purpose.")

B. A Public Employer's Authorization of Exclusive Representation For Purposes of Collective Bargaining Is Not Subject to Strict Scrutiny.

Arguing that exclusive representation violates the First Amendment right of association, petitioners rely on the line of cases that includes *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). But those cases dealt with mandatory *membership*, which obviously amounts to forced association. That is not the case with exclusive *representation*, where an employee is not forced to become a member of the union, to attend union meetings, or otherwise to act in concert with the union.

This Court said as much in *Knight*, explaining that nonmember employees' "associational rights . . . have not been infringed" by the state's "restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative," because "[t]he state has in no way restrained [employees'] freedom to associate *or not to associate* with whom they please, including the exclusive representative." *Knight*, 465 U.S. at 288 (emphasis added). In 1983, this Court considered the matter so free of doubt that it summarily affirmed a decision that "rejected . . . [an] attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment, relying chiefly on *Abood*." *Knight*, 465 U.S. at 278 (describing *Knight v. Minn.*

Cmty. Colls. Faculty Ass'n, 460 U.S. 1048 (1983)). And in *Knight*, where exclusive representation was upheld not only with respect to collective bargaining but also with respect to "meet and confer" sessions concerning questions of policy, even the Justices who dissented on the latter point agreed that "there is no dispute that Minnesota may limit the process of negotiation on the terms and conditions of public employment to the union that represents the employees in a given collective bargaining unit." *Id.* at 301 (Stevens, J., dissenting). *See also id.* at 300 (Brennan, J., dissenting) ("As we have often recognized, the use of an exclusive union representative is permissible in the collective-bargaining context because of the state's compelling interest in reaching an enforceable agreement.").

The Court's affirmation of the constitutionality of exclusive representation in *Abood* and *Knight* is not in tension with *Roberts* and its progeny. The *Roberts* line of cases is concerned with regulations which, by requiring a group to accept members it does not want, "may impair the ability of the original members to express only those views that brought them together." *Roberts*, 468 U.S. at 623. Those decisions reason that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association *if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.*" *Dale*, 530 U.S. at 648 (emphasis added).[5] But an agency shop,

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As Justice Alito has explained, because "a group's First Amendment right of expressive association is burdened by the 'forced inclusion' of members whose presence *would 'affec[t] in a significant way the group's ability to advocate public or private viewpoints'* [, the] Court has *therefore* held that the

which does *not* compel membership, does not impair employees' ability to communicate their own messages. "A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint . . . in public or private orally or in writing." *Abood*, 431 U.S. at 230. Employees remain free "to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public . . . ." *City of Madison*, 429 U.S. at 175-76 & n.10.

Equally to the point, *Roberts* and its progeny do not speak to association that is required incident to the government's business as an *proprietor*. All employment involves association, and government employment necessarily requires association under terms set by the government. Standards that apply where, as in *Roberts* and *Dale*, the government imposes mandatory membership requirements that have nothing to do with the government's own operations, are not on point in assessing choices that are made by the government pursuant to its interests and powers as a proprietor to ensure the efficient operations of and among its employees and/or contractors. *See supra* at 8-10; *infra* at 28-31.[6]

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government may not compel a group that engages in 'expressive association' to admit such a member unless the government has a compelling interest, 'unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms.'" *Christian Legal Soc'y Chapter v. Martinez*, 130 S. Ct. 2971, 3014 (2010) (Alito, J., dissenting) (emphasis added) (quoting *Dale*, 530 U.S. at 648, in turn quoting *Roberts*, 468 U.S. at 623).

[6] In *Christian Legal Society*, which presented a related context where the government's proprietary interests (in control

This case likewise bears no resemblance to *Elrod v. Burns*, 427 U.S. 347 (1976), cited in the Brief for Petitioners at 46. In *Elrod*, as in the *Roberts* line of cases, the challenged practices impeded self-expression and association: an individual could "maintain[] affiliation with his own party [only] at the risk of losing his job," 427 U.S. at 355, and "[h]e works for the election of his party's candidates and espouses its policies at the same risk," *id.* Furthermore, as the Court later explained in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n. 4 (1990), the patronage practices at issue in *Elrod*, although concerned with employment, were not based on "interests that the government has in its capacity as an employer." *See also Elrod*, 427 U.S. at 366 (patronage discharges could not be justified "as a means of furthering government effectiveness and efficiency").[7]

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over its property) were implicated, this Court held that only a requirement of reasonableness and viewpoint neutrality – *not* Roberts' requirement of strict scrutiny – applies to a compelled-membership rule that is adopted by the government in furtherance of "a State's right 'to reserve the property under its control for the use to which it is lawfully dedicated.'" 130 S. Ct. at 2984. That is the case even where the compelled membership "makes it difficult for certain groups to express their views in a manner essential to their message." *Id.* at 2999 (Kennedy, J., concurring). This Court followed a quite similar approach in assessing and affirming a government's right, in service of its interest in efficient collective bargaining to reserve its property for the communications of the designated exclusive representative, as that representative was viewed by this Court as fulfilling "official responsibilities" within the government's personnel system. *See Perry*, 460 U.S. at 51.

In *Kusper v. Pontikes*, 414 U.S. 51 (1973), also cited in Pet. Br. at 46, an individual who wished to affiliate with a

Consequently, although the governmental interests served by exclusive representation for collective bargaining may properly be characterized as "compelling," *see Knight*, 465 U.S. at 299 (Brennan, J., dissenting on other issues), or "vital," *Keller*, 496 U.S. at 13 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455-456 (1984)), the compelling-interest standard discussed in *Roberts* is simply not applicable here. This Court's determination in *Abood* that the governmental interests served by exclusive representation are "important," 431 U.S. at 225, therefore is sufficient to justify exclusive representation – even if, contrary to *Knight*, this were considered to involve some limitation on freedom of association. *See Lathrop v. Donohoe*, 367 U.S. 820, 843 (1961) (requiring attorneys to be members of an integrated bar and to pay bar dues did not work "any impingement upon protected rights of association" because the State "might reasonably believe" that this served "a legitimate end of state policy"); *United Foods*, 553 U.S. at 414 (the question is whether there is "an otherwise proper goal requiring the cooperative activity").

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political party was impeded by a law that "substantially restrict[ed] an Illinois voter's freedom to change his political party affiliation." 414 U.S. at 57. The case therefore involved "[e]lection regulations that impose a *severe* burden on associational rights," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (emphasis added), which are subject to strict scrutiny, unlike election regulations that impose lesser burdens on associational interests, which will be sustained as long as they are "reasonable [and] nondiscriminatory," *id.* at 452 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

C. An Agency Shop Does Not Involve Impermissible Subsidization of Speech.

1. Although petitioners' *amici* compare an agency shop to cases of "compelled speech" such as *Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977),[8] petitioners themselves make no such contention, and do not mention *Barnette* or *Wooley*. For good reason: a "compelled-speech violation" can be found only where "the complaining speaker's own message was affected by the speech it was forced to accommodate," *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006), and that is not the case with an agency shop.[9]

So too, although some of petitioners' *amici* maintain that an agency shop "coerc[es] citizens to financially support speech they oppose," Nonunion Teachers Br. at 6, petitioners have not alleged, in their complaint or in their briefs, that they disagree with any position the union has taken in bargaining (not to mention in grievance handling and other activities) apart from the

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[8] *See* Nonunion Teachers Br. at 16; Brief *Amicus Curiae* of Center for Constitutional Jurisprudence, *et al.* ("CCJ Br.") at 4, 8.

[9] Although the compelled speech doctrine may extend to some situations in which speech is *attributed to* an individual who is not himself forced to speak, *see Johanns*, 544 U.S. at 565-66, there is no risk that the positions taken by a union will be attributed to an employee who has declined to join the union, merely because he has been required by his employer to pay an agency fee. An agency shop therefore presents none of the features of a compelled-speech claim. *See id.* at 565 n.8; *Rumsfeld*, 547 U.S. 64-65; *PruneYard Shopping Ctr. v. Robins*, 447 US. 74, 88 (1980).

agency fee requirement itself. After all, the union's bargaining has been directed at improving wages and benefits, and although it is conceivable that some employees might oppose improvements in their wages and benefits, as far as we are aware there are no cases in which nonunion employees have testified that that is the basis of their objection to paying agency fees.

Moreover, "[t]here are no allegations that the fair share fees here are used to support any political or ideological activities." Pet. App. 35a. [10] In some cases, of course, a union may negotiate contract provisions to

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[10] *Abood* established that nonmembers cannot be required to contribute to such activities. The assertions of petitioners' *amici* regarding union political expenditures therefore are beside the point. For example, none of the political expenditures of CTA that are described at pp. 16, 19-20 of the CCJ Brief were treated as chargeable. Indeed, for 2012-13, only 65.4% of CTA's agency fee, and only 40.0% of NEA's agency fee, was charged to objectors. The Nonunion Teachers nevertheless assert that the fees paid to state and national organizations must be to further "non-bargaining-related political objectives," because those organizations have "no connection to local collective bargaining." Nonunion Teachers Br. at 29. That is incorrect. National unions like NEA often provide substantial grants to state and/or local affiliates to enable those affiliates to employ qualified negotiators, and state and national unions like CTA and NEA spend large sums on research and other services that local affiliates draw upon in bargaining.

Some of the *amici* suggest that the line between chargeable and nonchargeable activities can be difficult to draw. But this Court has made a similar observation regarding the line between matters of public concern and matters of private concern. *Garcetti v. Ceballos*, 475 U.S. 410, 418 (2006). That "conducting these inquiries sometimes has proved difficult," *id.*, does not distinguish this from other areas of First Amendment law.

which some individuals object on religious or ideological grounds, as with *Abood*'s example of an employee whose "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan." 431 U.S. at 222. But even there, it generally will be the case that the union has devoted far more resources to negotiating items of which the employee *approves*, such as higher wages or the medical plan as a whole. Such an employee will have recognized the "benefits of union representation," *Abood*, 431 U.S. at 222, and cannot fairly be considered to have been injured by the requirement that he pay a *pro rata* share of the costs of the Union's beneficial efforts on his behalf merely because he would have preferred that one provision of the collective bargaining agreement had been different. And of course, absent collective bargaining, the employer would design its medical plan unilaterally and might make any number of choices that an individual employee would find objectionable.

If, on the other hand, an employee does not believe that union representation is worth the money he is required to pay for it, that is not in itself a disagreement of constitutional dimension, because the First Amendment gives a public employee grounds for objecting to an employment requirement only where speech involves a matter of *public concern*. *Borough of Duryea*, 131 S. Ct. at 2493; *Connick v. Myers*, 461 U.S. 138, 147 (1983).

2. It would be wrong in any event to maintain that where an employee *does* oppose positions a union has pursued in collective bargaining, an agency fee requirement compels him to *subsidize speech* to which he is opposed.

"[C]ollective bargaining, and related activities such as grievance arbitration and contract administration, are *part and parcel of the very economic transactions* between employees and employers that [the government] can regulate." *Glickman*, 521 U.S. at 484 (Souter, J., dissenting) (emphasis added). This case therefore is easier that *Glickman*, *United Foods* and *Johanns*, where the public advertising at issue was pure speech. To treat collective bargaining and contract administration as speech merely because they "often include[ ] elements of speech," *Rumsfeld*, 547 U.S. at 61, would be no more correct than to "[deem it] an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed,'" *id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

The Nonunion Teachers therefore get things right when they characterize "grievance representation" as a "non-speech [function]." Nonunion Teachers Br. at 20. But that is true of collective bargaining as well, which often involves more in the way of research, analysis and strategizing than in the assertion of positions and messages. For, whatever may be the amount of speech that takes place in the course of a particular round of bargaining, employees are required to contribute to the costs of their union's collective bargaining not because of what the union *says* in that process but because of what it *produces* – a collective bargaining agreement.

Thus, agency fees are charged because a union "deliver[s] services." *Lehnhert*, 500 U.S. at 556 (Scalia, J., concurring and dissenting). The representation for which a nonmember pays an agency fee has "the na-

ture of a prepaid . . . consulting or legal services plan," *id.* at 563 (Kennedy, J., concurring and dissenting), whereby services are provided "pursuant to an arrangement that is akin to an insurance policy," *Locke*, 555 U.S. at 222 (Alito, J., concurring).[11] It mischaracterizes the situation to maintain that a nonmember is paying a fee to subsidize positions the union takes in grievances for other employees; it would be more accurate to say that the nonmember is securing the right to representation in his own behalf in the event that he should become the victim of a contract violation. By the same token, an employee may be required to pay a *pro rata* share of the union's bargaining costs, not to subsidize whatever messages the union may communicate in the course of bargaining, but to secure the benefits of the agreement that is bargained, in which the employee will share.[12]

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[11] Those cases were referring to the affiliation fee a local union pays to its national parent organization, a *pro rata* share of which is included in the agency fee. But the characterization holds true with respect to a local union's own charges as well.

[12] Challenges to agency fees, to the extent that they spring from anything more than a desire for a free ride, often are predicated on objections to the terms of an employee's collective bargaining agreement rather than on objections to speech by the union as such. For example, the Nonunion Teachers "object to collective-bargaining contracts [which they regard as] geared toward protecting middling employees at their expense." Nonunion Teachers Br. at 21. But such an objection to terms of a collective bargaining agreement has no more traction as a First Amendment claim than would an objection to the agricultural marketing orders in *Glickman*. Comparing themselves to the mushroom growers in *United Foods* who believed that they produced superior mushrooms, the Nonunion Teachers, who "believe they have superior skills," *id.*, get *United Foods*

Furthermore, in the agricultural marketing cases, the government required growers to subsidize generic advertising because it agreed with the ads' message "that [the products] are worth consuming whether or not they are branded." *United Foods*, 533 U.S. at 411. Thus the government sought to impose "special subsidies for speech on the side [of a disputed issue] that it favors." *Id.* But a government does not provide for exclusive representation and agency fees because it agrees with the positions that are espoused in bargaining by a particular union or by unions generally. On the contrary, "the basic assumption underlying collective bargaining in both the public and private sector," *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983), is that "[t]he parties – even granting the modification of views that may come from a realization of economic interdependence – still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488 (1960). As with the access to the school mail system that was reserved to the exclusive bargaining representative in *Perry*, a government authorizes payment of agency

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backwards. A First Amendment violation was found in that case not because the government had subjected mushroom growers to a collectivized regime of production and marketing, but because, unlike in *Glickman*, the government had *not* done so, but nevertheless had required the growers to pay for collective public advertising. *See United Foods*, 533 U.S. at 412-15. *See also Johanns*, 544 U.S. at 558 (*United Foods* recognized that "*Abood* and *Keller* would permit the mandatory fee if it were 'germane' to a 'broader regulatory scheme'") (citation omitted); *id.* at 558 n.3 (*Glickman* "agreed . . . that compelled support for generic advertising was legitimately part of the Government's 'collectivist' centralization of the market for tree fruit.").

fees to an exclusive representative "based on the *status* of the . . . union[ ] rather than [its] views." 460 U.S. at 49 (emphasis in original).

3. If an agency shop nevertheless were considered to involve compulsory subsidization of speech, *Abood* was correct in concluding that any impact on First Amendment interests that may be presented is justified by "[t]he governmental interests advanced by the agency-shop provision." *Abood*, 431 U.S. at 224.

a. In the first place, compelled *subsidization* is not equivalent to compelled *speech*. Where the government itself dictates speech, compelled subsidization is *permitted*, whereas compelled speech is generally *prohibited*. *See Johanns*, 544 U.S. at 562-63, 564-65 n.8. And where the government facilitates *private* speech as part of a governmental program, such compelled subsidization is impermissible only if the speech is "unconnected to *any legitimate government purpose*." *Id.* at 565 n.8 (emphasis added). *Cf. Southworth*, 529 U.S. at 232 (assessment of student activity fees, where it was "all but inevitable that the fees [would] result in subsidies to speech which some students find objectionable and offensive to their personal beliefs," was permissible in light of the public university's "significant interests").

This Court's decisions thus lend no support to the notion that claims of compelled subsidization are subject to strict scrutiny as a general matter – much less where any speech that is being subsidized is "part and parcel of" lawful economic transactions.

b. Petitioners' argument for strict scrutiny fails for another equally fundamental reason. "[G]overnment has significantly greater leeway in its dealings

with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Borough of Duryea*, 131 S. Ct. at 2497 (quoting *Engquist*, 553 U.S. at 599). The government's decisionmaking as employer is suffused with "substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees." *Id.* at 2495. *See Waters*, 511 U.S. at 674-75 (plurality opinion) (the government must be afforded "extra power ... in this area" so that it may carry out its operations "as effectively and efficiently as possible"). *See also Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) ("if the [g]overnment is to perform its responsibilities effectively and economically ..., [it] must have wide discretion and control over the management of its . . . internal affairs").

This principle extends to "many contexts, with respect to many different constitutional guarantees." *Rutan*, 497 U.S. at 94 (1990) (Scalia, J., dissenting). The First Amendment is no exception. Although private citizens cannot be punished for "speech of merely private concern," government employees certainly can. *Id.* at 95 (citing *Connick*, 461 U.S. at 147). Similarly, speaking about politics and other issues of public concern are at the heart of the First Amendment's protections, and it goes without saying that private citizens cannot be punished for those activities. *See Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Yet, public employees can be dismissed for engaging in purely political speech or association. *See Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (upholding the Hatch

Act's prohibition on taking "any active part in . . . political campaigns"). And, they can be punished for engaging in speech on a matter of public concern that impairs the "efficiency of the public services [the government] performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).[13]

Because public employees thus must accept certain restrictions on First Amendment rights due to "the consensual nature of the employment relationship and . . . the unique nature of the government's interest," *Borough of Duryea*, 131 S.Ct. at 2494, petitioners' call for strict scrutiny is utterly without foundation. *See Rutan*, 497 U.S. at 98 (Scalia, J., dissenting) ("Th[e] strict-scrutiny standard finds no support in our cases.").[14] Far from requiring the

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[13] Petitioners' perverse attempt to use the *Pickering/Connick* line of cases to confine collective bargaining to matters that are not of public concern, *see* Pet. Br. at 28-31, misses the mark entirely. It is *not* the case, as petitioners would have it, that the interests of the government as employer cannot support restrictions on speech or association that involve matters of public concern. On the contrary, activity that surpasses the "public concern" threshold may be restricted to the extent that it interferes with the "countervailing interest of the government in the effective and efficient management of its internal affairs." *Borough of Duryea*, 131 S.Ct. at 2500; *see also Garcetti*, 547 U.S. at 420. In numerous cases, the Court has upheld restrictions on public-employee speech and association touching on matters of the utmost public concern, requiring only that the government's efficiency-based justifications for the restrictions were reasonable. *See Connick*, 461 U.S. at 149-54; *Mitchell*, 330 U.S. at 101.

[14] In *Rutan*, the opinion of the Court, while stating no view as to whether Justice Scalia was "correct that less-than-strict scrutiny is appropriate when the government takes measures to ensure the proper functioning of its internal operations," found

government to show that its interest in the efficient operation of its affairs is "compelling," this Court consistently has held that governments are "granted the widest latitude" in ordering their affairs, *Sampson v. Murray*, 415 U.S. 61, 83 (1974), and that restrictions on public-employee speech imposed in that capacity need only be reasonable. *See Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980) ("[A] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government."); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) ("[T]his Court's cases make clear that . . . [a government employer] could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment."); *Mitchell*, 330 U.S. at 101 ("[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service").[15]

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this to be of "no relevance" to the patronage practices challenged in *Rutan*, because the Court concluded that the interests offered in justification of those practices "are not interests that the government has in its capacity as an employer." *Id.* at 70 n.4 (opinion of the Court). Thus, *Rutan* and the Court's other patronage decisions are not inconsistent with the proposition that strict scrutiny has no place where, as here, the government *is* acting in furtherance of "interests that the government has in its capacity as an employer."

[15] In assessing the reasonableness of the government's employment decisions, a court may not demand empirical proof that the government's assessments were correct. This Court has "given substantial weight to government employers'

Abood therefore was correct to sustain the public sector agency shop on the ground that it serves "important government purposes," *see supra* at 10, rather than imposing a level of scrutiny that has no place where a state or local government is acting as a proprietor, managing its internal operations.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Waters*, 511 U.S. at 673 (plurality opinion) (emphasis added) (citing *Connick*, 461 U.S. at 151-152; *U.S. Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 566-67 (1973)). *See also Mitchell*, 330 U.S. at 101 ("[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service"); *United States v. Kokinda*, 497 U.S. 720, 735-36 (1990) (plurality opinion) (rejecting contention that a Postal Service regulation of speech on its own property was impermissible "because of the existence of less restrictive alternatives" and concluding that "[e]ven if more narrowly tailored regulations could be promulgated . . ., the Postal Service is only required to adopt *reasonable* regulations, not 'the most reasonable or the only reasonable' regulation possible") (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985)) (emphasis in original). *See also Perry, supra*; *Christian Legal Society, supra* note 6.

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AMICUS CURIAE BRIEF

No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,

Petitioners,

v.

PAT QUINN, Governor of Illinois, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ARKANSAS, DELAWARE, HAWAII, IOWA, KENTUCKY, MAINE, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, PENNSYLVANIA, RHODE ISLAND, AND VERMONT, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Congress has comprehensively regulated labor relations in the private sector, but has left it to the States to address labor relations between state and local governments and their own employees. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court confirmed that the Constitution permits States to adopt for the public sector the same model of collective bargaining that is widely used in the private sector pursuant to federal labor law. This model authorizes employees to select a union to act as their exclusive representative in collective bargaining negotiations, and, as an adjunct, permits the selected union to charge all represented employees, including those who decline to join the union, an "agency fee" to defray the costs of union collective-bargaining activities benefiting all employees. *Abood*'s framework is foundational to state labor law. Forty-one States, the District of Columbia, and the Commonwealth of Puerto Rico have adopted exclusive representation for public-sector labor relations, and twenty-two of those States and the District of Columbia, authorize agency fees as well.

Amici States address the following question raised by petitioners:

Should *Abood* be overruled or severely limited, thereby forcing States to abandon the collective-bargaining model of exclusive representation and agency fees that States have used for decades to ensure peace and stability in state and local government labor relations?

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INTEREST OF THE AMICI STATES

Amici, the States of New York, Arkansas, Delaware, Hawaii, Iowa, Kentucky, Maine, Minnesota, Missouri, New Hampshire, New Mexico, Pennsylvania, Rhode Island, and Vermont, and the District of Columbia[1], file this brief in support of respondents, Pat Quinn, the Governor of Illinois, SEIU Healthcare Illinois and Indiana, and other respondent unions. Amici States have a compelling interest in preserving the flexibility in structuring public-sector labor relations upheld by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* held that deference should be afforded to States' policy choices concerning public-sector labor relations, and in particular, affirmed that the government interest in achieving labor peace is sufficient to authorize exclusive representation and agency-fee charges as part of an effective system for settling public-sector labor disputes through collective bargaining. While resolving that the First Amendment did not prohibit States from adopting these same tools for public-sector collective bargaining that had long proven effective in the private sector, *Abood* also made clear that public employees must be allowed to decline to fund political or ideological activities by unions unrelated to the collective-bargaining process.

Amici States employ a wide range of different public-sector labor schemes. But whatever their

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[1] The District of Columbia is not a State, but possesses a strong interest in this matter similar to those of the States. It is included in this brief's references to "amici States."

current scheme, all Amici States have a common interest in preserving the regulatory flexibility that has been a core feature of public-sector labor relations since *Abood*. The practical experience of Amici States confirms that there is no one-size-fits-all solution: The task of balancing the potentially divergent interests of public employers, employees, unions, and the public is delicate and difficult, and also politically sensitive. And the stakes are high. The relative success of state labor relations systems since *Abood* should not be mistaken for evidence that the leeway afforded by that decision is no longer needed. In the decades before *Abood*, many States like New York faced paralyzing public-employee strikes and labor unrest that routinely jeopardized public order and safety. Because such public-sector unrest disrupts secure and effective provision of government services and results in great public harm, the States' interest in achieving labor peace in the public sector is far greater than any government interest in avoiding strikes and work interruptions in private industry. For state and local governments, labor peace secures the uninterrupted function of *government itself* and is a necessary precondition for the services and programs state and local governments provide.

In addition to preserving a range of regulatory options, Amici States also have a fundamental interest in avoiding the vast disruption in state and local labor relations that would occur if *Abood*'s framework were now abandoned. Overturning *Abood*, as petitioners seek, would disrupt hundreds of currently effective collective bargaining agreements and threaten to unsettle the public-sector labor schemes of nearly every State, the District of

Columbia and Puerto Rico. All States that statutorily authorize collective bargaining by public-sector employees have enacted a system of exclusive representation, and twenty-two of those States and the District of Columbia permit agency fees. Excising these features would upset the carefully calibrated systems of almost every State in the Union and mandate vast and untested changes in public-sector labor relations.

Petitioners and others who oppose the concept of public-sector unions or who object to exclusive representation or agency fees have recourse that does not require overturning settled precedent and constitutionalizing a single approach to public-sector labor relations for all state and local governments nationwide. *Abood* is permissive, not mandatory: voters and elected officials in each State remain free to decide what rules or policies should apply in public-sector labor relations. This Court should decline to intervene in the ongoing policy debate about public-sector unions, just as it declined to do so in deciding *Abood* nearly forty years ago.

STATEMENT OF THE CASE

Labor relations law in the United States has long been based on a model of exclusive representation accompanied by "agency-fee" authorization. The first federal law guaranteeing workers the right to organize was the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* Enacted in 1926 after decades of labor unrest in the railroad industry, resulting in repeated railroad shutdowns, the RLA enabled railroad workers to select a union that would serve as their exclusive representative in collective-bargaining

negotiations and imposed a corresponding duty of fair-representation on the union to represent all employees fairly, in good faith, and without discrimination. *See Burlington N. R.R. Co. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 444 (1987); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 750-60 (1961). The RLA was later expanded to specifically authorize "union-shop" arrangements,[2] including provisions requiring workers to pay the union fees to the union designated as their exclusive-bargaining representative, as a condition of continued employment.

Congress adopted a similar model in 1935 in enacting the much broader National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, the federal statute that comprehensively regulates labor relations for most employees in the private sector. As with the RLA, Congress sought to end labor strife and to reduce the need for labor strikes by fostering a process of collective bargaining. And Congress once again selected a system of collective bargaining founded on exclusive representation as the best model for achieving labor peace. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981). To protect the effective operation of the exclusive representation system, the NLRA also authorized "agency shop" agreements requiring all represented

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[2] *See* Ch. 1220, 64 Stat. 1238 (1951) (amending 45 U.S.C. § 152). The term "union shop" is generally, though not always, used to denote a requirement of union membership and fee payment by all represented employees, while "agency shop" denotes a requirement to pay fees but not to join the union. *See Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409 n.1 (1976).

employees to pay fees to cover costs of collective bargaining. *See Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 738 & 744-45 (1988).

In a series of decisions beginning with *Railway Employees' Department v. Hanson*, 351 U.S. 225, 238 (1956), this Court construed the "union shop" and "agency shop" provisions of the RLA and NLRA as requiring only financial support for an employee-selected union, not compelled union membership by objecting employees. This Court also determined that compulsory fees must be limited to compensating the union for actual collective-bargaining related activities, and could not be used to fund unrelated political lobbying. With the statute so narrowed, the Court rejected claims that government legislation authorizing unions to impose a mandatory financial obligation on represented employees to support union activities germane to collective bargaining violated the First Amendment rights of objecting employees. *See Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113 (1963); *Street*, 367 U.S. at 749.

These decisions left open the question whether States could adopt the same tools in establishing labor-relations systems for employees of state and local governments. In *Abood*, this Court settled the scope of state authority. *Abood* involved a First Amendment challenge to a Michigan statute that authorized collective bargaining for local public employees under the same exclusive-representation/agency-fee model authorized by federal law for the private sector. 431 U.S. at 223-24. In addressing objecting employees' First Amendment challenge, this Court acknowledged differences between private-sector and public-sector collective bargaining, but found no reason to prohibit States from adopting

familiar tools to promote effective collective bargaining in public employment.

Abood found that "[t]he governmental interests advanced by the agency-shop provision" in Michigan's statute were "the same as those promoted by similar provisions in federal law." *Id.* at 224. This Court noted that the government had a strong interest in providing for exclusive representation given "the confusion and conflict that could arise" if rival unions all vied for employee members, and government employers had to reach multiple, potentially varying agreements with different unions. *Id.* While exclusive representation confers similar benefits for both private- and public-sector collective bargaining, it also creates an inherent "free-rider problem:" if employees were guaranteed union representation regardless of their payment of fees, they may decline to share in the costs incurred by the union—creating the risk that unions would be underfunded and unable to fulfill their intended duties and responsibilities. *See id.* at 221 (recognizing that the union's "tasks of negotiating and administering a collective-bargaining agreement . . . often entail expenditure of much time and money"). *Abood* concluded that the differences between public- and private-sector collective bargaining should not deprive States of the ability to pursue labor peace through effective collective bargaining by adopting exclusive-representation and agency-fee rules similar to those sanctioned under federal law for private-sector labor regulation. *Id.* at 231-32.

Abood recognized that public-sector unionization was controversial as a policy matter. This Court acknowledged that there was widespread debate and disagreement about the application of private-sector

models to public-sector labor relations. *Id.* at 224-25 & 229. But this Court warned against judicial intervention in questions about how to structure effective labor relations. Instead, *Abood* deferred to state judgments about appropriate measures for effective state and local government labor relations—noting that the "ingredients" of labor peace and stability were too numerous and complex, and too time-and-context-dependent, for judges to second-guess the wisdom of particular state choices. *Id.* at 225 n.20 (quoting *Hanson*, 351 U.S. at 233-34).

With *Abood*, the framework for both private- and public-sector labor relations was settled. The Court's precedents, culminating in *Abood*, established this general principle: "The First Amendment permits the government to require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative . . . to pay that union a service fee as a condition of their continued employment," so long as objecting employees are not charged for political or ideological activities unrelated to the union's collective-bargaining activities. *Locke v. Karass*, 555 U.S. 207, 213 (2009). In both situations, this Court's precedents "determined that the First Amendment burdens accompanying the payment requirement are justified by the government's interest in preventing freeriding by nonmembers who benefit from the union's collective-bargaining activities and in maintaining peaceful labor relations." *Id.*

Abood's framework is now central to state labor law. *See* Appendix, Survey of State Statutory Authority for Public-Sector Collective Bargaining by Exclusive Representative. Forty-one States, the District of Columbia and Puerto Rico, authorize

collective bargaining for at least some public employees, and all adopt the federal model of exclusive representation.[3] Twenty-two States and the District of Columbia also authorize agency fees (also known as "fair share" fees) to provide a mechanism for ensuring that represented employees contribute to union costs germane to collective bargaining. The majority of these statutes make agency-fee requirements a permissible subject of bargaining and authorize (but do not require) agency-fee provisions as part of public-sector collective bargaining agreements.[4] Many state agency-fee statutes were enacted in specific reliance on *Abood*.[5]

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[3] *See* Alaska Stat. § 23.40.110(b); Ark. Code. § 6-17-202; Cal. Gov't Code § 3515.5; Conn. Gen. Stat. § 5-271; Del. Code tit. 19, § 1304(a); D.C. Code § 1-617.10; Fla. Stat. § 447.307(1)(a); Ga. Code Ann. § 25-5-5; Haw. Rev. Stat. § 89-8; Idaho Code §§ 33-1273, 44-1803; 5 Ill. Comp. Stat. § 315/3(f); Ind. Code §§ 20-29-5-2, 20-29-2-9; Iowa Code § 20.16; Kan. Stat. § 72-5415(a); Ky. Rev. Stat. §§ 67A.6902, 345.030; La. Rev. Stat. § 23:890(D); Me. Rev. Stat. Ann. tit. 26, §§ 967 & 979-F; Md. Code, State Pers. & Pens., §§ 3-301, 3-407; Mass. Gen. Laws ch. 150E, § 4; Mich. Comp. Laws Ann. §§ 423.26, 423.211; Minn. Stat. § 179A.06(2); Mo. Rev. Stat. §§ 105.510-105.520; Mont. Code Ann. §§ 39-31-205, 39-31-206; Neb. Rev. Stat. § 48-838 (4); Nev. Rev. Stat. 288.160; N.H. Rev. Stat. Ann. §§ 273-A:38, 273-A:11; N.J. Stat. § 34:13A-5.3; N.M. Stat. Ann. § 10-7E-15; N.D. Cent. Code § 15.1-16-11; N.Y. Civ. Serv. Law § 204; Ohio Rev. Code § 4117.04; Okla. Stat. tit 19, § 901.30-2(E), Or. Rev. Stat. § 243.666; 43 Pa. Stat. § 1101.606; P.R. Laws tit. 3, §§ 1451b, 1451f; R.I. Gen. Laws § 36-11-2; Texas Loc. Gov't Code § 174.101-102; S.D. Codified Laws § 3-18-3; Utah Code § 34-20a-4; Vt. Stat. Ann. tit. 3, § 941(h) & tit. 16 § 1991(a); Wash. Rev. Code §§ 41.56.080, 41.80.080(2)-(3); Wis. Stat. § 111.83(1); Wyo. Stat. § 27-10-103.

[4] *See* Alaska Stat. § 23.40.110(b); Cal. Gov't Code §§ 3502.5, 3513(k), 3515, 3515.7; 3546, 3583.5; Conn. Gen. Stat. § 5-280;

(*continues on next page*)

As relevant here, the Illinois Public Labor Relations Act (IPLRA) permits state employees to select a union to serve as their exclusive representative in collective bargaining negotiations with the State. 5 Ill. Comp. Stat. 315/6(a). The IPLRA also contains language, specifically drafted by the Illinois Legislature to comport with *Abood*,[6] authorizing collective-bargaining agreements to require non-union-member employees to "pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." *Id.* 315/6(e).

This First Amendment challenge to the IPLRA's agency-fee provision is brought by persons employed under Illinois Medicaid programs and paid by Illinois to provide in-home services to individuals who would otherwise face institutionalization due to their need for long-term care. Pet. App. 2a-3a. The lower courts

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Del. Code § 1319; D.C. Code § 1-617.07, Haw. Rev. Stat. § 89-4; 5 Ill. Comp. Stat. 315/6(e), 115 Ill. Comp. Stat. 5/11; Me. Rev. Stat. Ann. tit. 26, § 629; Md. Code, State Pers. & Pens. § 3-502; Mass. Gen. Laws ch. 150E, § 2; Minn. Stat. § 179A.06; Mo. Rev. Stat. § 105.520; Mont. Code Ann. § 39-31-204; N.H. Rev. Stat. Ann. § 273-A.11; N.J. Stat. § 34:13A-5.5; N.M. Stat. § 10-7E-4; N.Y. Civ. Serv. Law § 208(3); Ohio Rev. Code § 4417.09(C); Or. Rev. Stat. § 243.672(c); 43 Pa. Stat. Ann. § 1102.3; R.I. Gen. Laws § 36-11-2; Vt. Stat. Ann., tit. 3, § 962 & tit.16, § 1982; Wash. Rev. Code §§ 41.80.100, 41.59.100, 47.64.160, 288.52.045.

[5] *See, e.g.*, N.Y. Div. of Budget, Budget Report for S. 6835, at 3, *reprinted in* Bill Jacket for ch. 677 (1977) (discussing *Abood*).

[6] *See* Sally J. Whiteside, Robert P. Vogt, & Sherryl R. Scott, *Illinois Public Labor Relations Laws: A Commentary and Analysis*, 60 Chi.-Kent L. Rev. 883, 924 & n.264 (1984).

dismissed all claims. Pet. App. 1a-39a. In particular, the court of appeals ruled that the plaintiffs were state employees within the meaning of *Abood* and found no legal or factual basis to distinguish *Abood*'s holding that agency fees in the public sector do not violate the First Amendment.[7] Pet. App. 1a-2a, 13a.

SUMMARY OF ARGUMENT

Abood appropriately afforded deference to state judgments about how best to structure the labor relations of state and local governments. Such deference not only reflects the complex issues involved in crafting a fair and effective system of public-sector labor relations, but also recognizes the paramount government interest in maintaining labor peace and avoiding disruptions in government operations and services.

In arguing that *Abood* should be overruled, petitioners and their amici distort the nature of the government's interest in labor peace and ignore the history of public-sector collective-bargaining laws. Contrary to their arguments, the government interest in labor peace is not limited to avoiding internal workplace or management disruption. Rather, States enacted collective-bargaining laws for public employees in response to public-sector strikes and labor breakdowns that threatened the provision of government services and imposed vast financial

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[7] The court of appeals' holding is narrow. The court concluded that plaintiffs were "state employees" for the limited purpose of collective bargaining, and the only issue decided by the court was the constitutionality of authorizing agency fees under the First Amendment. Pet. App. 1a, 6a.

and other harms on the public. The government's compelling interest in avoiding such breakdowns and the attendant public harm continue to support public-sector collective-bargaining laws today.

Consistent with *Abood*, different States have enacted different systems for regulating public-employee labor relations. This variation is not a reason to abandon *Abood*, but rather a natural and appropriate result of its flexible framework. And the degree of variation in state laws should not be overstated: exclusive representation and agency fees are widely used in public-sector collective bargaining today, as they have been for decades, and as they have been used in the private sector since the beginning of United States labor law. *Abood* has appropriately allowed States to adopt the same toolkit for public-sector collective bargaining that Congress has long authorized for private-sector labor relations.

Finally, as petitioners and their amici emphasize, state and local governments stand in a dual role as employer and policy maker when structuring public-sector labor relations. But that unavoidable reality is no reason to restrict the States' ability to enact public-sector collective-bargaining systems modeled on federal labor law. Petitioners give short shrift to the government's interest, as employer, in structuring collective-bargaining systems to ensure that government operations are effective and efficient in serving the public. *Abood* accords fully with the traditional leeway granted to States under the First Amendment in controlling the public-employment relationship. This Court has consistently upheld the government's right to restrict the speech or associational activities of public employees, and it

has not prohibited States from adopting rules for managing public workers that are widely accepted as necessary in the private sector.

ARGUMENT

Abood recognized that the task of devising an appropriate labor-relations system is complex and challenging, and deferred to States' judgments that core elements of private-sector collective bargaining are also appropriate to secure labor peace in the public sector. The decision is now foundational to state labor law. As a result, petitioners' attack on *Abood*—and claim that both exclusive representation and agency fees should be banned for public-sector collective bargaining—is an attack on the fundamental choices made by the States, calling into question the labor-relations schemes of almost every State in the Nation.

Principles of *stare decisis* have special force when States have extensively relied on this Court's precedent in structuring their laws. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (plurality op.) (adhering to *stare decisis* is particularly important in "sensitive political contexts" where legislatures have modified key practices in reliance on this Court's precedent); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 785-86 (1992) (declining to abandon settled jurisprudence where "State legislatures have relied upon" this Court's precedent, and resulting state statutes would be invalidated if precedent were overruled or altered); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202-03 (1991) ("*Stare decisis* had added force" when state legislatures have relied on this Court's precedent and overruling a prior decision would require "States to

reexamine their statutes" and require "extensive" legislative amendment."). Even in constitutional cases, the doctrine of *stare decisis* carries such persuasive weight that this Court has "always required . . . special justification" for overruling settled precedent. *See, e.g., United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (quotation marks omitted).

Petitioners identify no special justification for overruling *Abood*. Their arguments trivialize the nature of the government's compelling interest in achieving labor peace, seek to constitutionalize models of collective bargaining that are untested or reflect policy judgments better left to the political process, and distort First Amendment doctrine as it applies to the public-employment relationship.

I. Achieving Labor Peace Is Critical to Avoiding Labor Unrest By Public Employees That Threatens Grave Public Harm By Disrupting Government Services And Programs.

Petitioners' argument that *Abood* is inconsistent with First Amendment doctrine hinges on an overly narrow and historically inaccurate conception of the government interest in labor peace. Petitioners trivialize the government interest in labor peace by treating it as limited to an efficiency-based concern with avoiding "internal" management or workplace disruptions in government offices or other work settings. *See* Pet. Br. 15, 25, 27, 39. But while amici States' experience confirms that public-sector collective bargaining promotes efficiency and associated benefits in government work settings, the States have enacted public-sector labor laws to

achieve a far broader and more compelling purpose: to protect the public's access to government services and programs from disruption through strikes and labor unrest.

A. State Laws Governing Public-Sector Collective Bargaining Were Adopted in Response to Devastating Strikes and Labor Unrest by State and Local Employees.

Labor regulation in the United States has always been concerned with avoiding harm to the public caused by labor strife and work stoppages. For example, Congress enacted the RLA and NLRA in large part to avoid the public harm caused by labor unrest by railroad workers, and workers in other private industries, that threatened to disrupt the flow of interstate commerce and undermine national economic stability.[8] Those statutes aimed to establish effective collective-bargaining procedures for the private sector as an alternative to labor disruptions that often had been violent, jeopardized public order, and destabilized the economy.

Public-sector collective-bargaining laws were likewise enacted to avoid public harm from work

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[8] *See* 29 U.S.C. § 151 (policy rationale supporting enactment of NLRA was to end industrial unrest and strikes caused by employees seeking the right to collectively bargain). *See generally Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 717 (2d Cir. 1966) (observing that the NLRA was "conceived during the Great Depression and founded upon a frank recognition that our boom-and-bust economy was attributable in part to labor-management unrest").

stoppages and other disruptions in government operations. States confronted many of the same issues regarding strikes and unrest in the public sector that private employers had faced. *See, e.g.*, Morris A. Horowitz, *Collective Bargaining in the Public Sector* 2 (1994) (citing David Ziskind, *One Thousand Strikes of Government Employees* (1940) (documenting 1,116 strikes by employees in all sectors of government service through 1940)). Although strikes and other work disruptions by public workers are now rare (yet not unheard of), they were common at the time that the majority of States first adopted state labor relations laws. States faced strikes by public employees of all types—from public school teachers to grave diggers. *See* Richard C. Kearney, *Labor Relations in the Public Sector* 221-24 (3d ed. 2001); Ronald Donovan, *Administering the Taylor Law: Pubic Employee Relations in New York* 1-3, 106-07 (1990) (discussing strikes in New York between 1940s and 1960s).

Important public services were repeatedly interrupted or disrupted by strikes (or the threat of strikes) by public workers. Much of the labor unrest occurred because state and local workers wanted a greater role in determining the terms of their employment and lacked other means, such as state-sanctioned collective bargaining, to air grievances and settle disputes with management. *See* N.Y. Governor's Comm. on Public Emp. Relations, *Final Report* 42, 54 (1966) (commenting that the inability of public employees to unionize and have "a greater

voice" in determining the terms of their employment contributed to the use of strikes).[9]

The pace of public-sector labor disruptions increased dramatically in the 1960s—in part, because public employees were seeking the *same* labor protections and rights that they had seen guaranteed to their private-sector counterparts through collective bargaining under federal labor law. Between 1965 and 1970, for example, there were over 1,400 separate work-stoppages by state and local public workers, involving well over a quarter million employees. Kearney, *supra*, at 226-27.[10] In

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[9] *See also* 5 Ill. Comp. Stat. § 315/2(2) (declaring that collective bargaining, in part, was designed to provide employees, barred from striking "an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act"); Pa. Governor's Comm'n to Revise the Pub. Emp. Law, *Report and Recommendations* 6 (1968) (concluding that the "inability" of public employees to "bargain collectively has . . . led to more friction and strikes than any other single cause"); N.Y. Governor's Comm., *supra*, at 9 ("There is now a widespread realization that protection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment.").

[10] *See also* Mass. Legis. Research Council, *Report Relative to Collective Bargaining and Local Government Employees* 31 (1969) (in 1966, 450,000 man-days were lost to strikes by public-sector employees); Anne M. Ross, *Public Employee Unions and the Right to Strike*, 92 Monthly Lab. Rev. 14, 14 (1969) ("In 1966-67 alone, strikes in the public sector, at the State and local levels, caused more idle man-days and involved more workers than strikes in all the preceding 8 years . . . ."); Jack Stieber, *Public Employee Unionism: Structure, Growth, Policy* 159-68 (1973) (describing rise in strike activity between 1958 and 1970).

the 1960s in New York alone, "strikes by public employees" were "too numerous to recall or record"; they included "strikes by transit workers, firemen, sanitation employees, teachers, ferry workers, and on other occasions, social workers, practical nurses, city-employed lifeguards, doctors and public health nurses, etc." *DiMaggio v. Brown*, 19 N.Y.2d 283, 289 (1967).

Walkouts and other work stoppages occurred despite state laws that directly prohibited public employees from striking or punished them for doing so.[11] *See, e.g., Ass'n of Surrogates & Sup. Ct. Reporters v. State*, 78 N.Y.2d 143, 152-53 (1991) (recounting New York's historical experience). The States found that direct prohibitions on strikes were ineffective and difficult to enforce, and failed to address the root causes of labor unrest.[12] And it quickly became clear that no matter what the merits or scope of the underlying controversy, labor unrest in the public sector had the potential to inflict vast public harm and disruption:

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[11] The existence of prohibitions on strikes by public employees, which remain common, underscore the vital importance of avoiding labor unrest in the public sector. *See* Kearney, *supra*, at 235 (thirty-five States ban strikes by public employees).

[12] *See, e.g.*, Pa. Governor's Comm., *supra*, at 7 (1968) (noting that "[t]wenty years of experience has taught" that statutory ban on public-employee strikes "is unreasonable and unenforceable, particularly when combined with ineffective or non-existent collective bargaining"); N.Y. Governor's Comm., *supra*, at 40-41 (explaining that "feeling of futility" among public-sector employees, grounded in their inability to participate in determining the terms of their employment, led to strikes despite statutory prohibition on strikes).

- In 1919, "looting, violence, and general mayhem" spread throughout Boston as result of a strike by city police officers. Kearney, *supra*, at 222-23. The same occurred in Baltimore during a 1974 strike by police officers, jail guards, and other municipal workers: "looting, shooting, and rock-throwing" were "widespread" and "fires ran 150 percent above normal." *See* Md. Dep't of Labor, Licensing & Regulation, *Collective Bargaining for Maryland Public Employees: A Review of Policy Issues and Options* 5 (1996) (recounting 1974 strike); Ralph de Toledano, *The Police Were Shouting "Scab,"* Daily News, Oct. 29, 1975, at 18 (same). State troopers had to patrol the streets to keep the peace. *See* Ben A. Franklin, *Troopers Patrol Baltimore to Bar Renewed Unrest*, N.Y. Times, July 13, 1974, at 1.

- During a series of public-teacher walkouts in New York City in 1968, more than a million children were denied schooling for thirty-six schooldays. Parents had to physically occupy public schools to keep the schools open; other parents banded together to improvise alternative schools in "churches, storefronts, brownstone basements and apartments." Many children were denied key services provided through public schools. For example, while the city typically provided 400,000 free daily lunches to schoolchildren, only 160,000 were provided during the teacher strikes. *See Strike's Bitter End*, Time, Nov. 29, 1968, at 97.

- Strikes by public transport workers in Cleveland, Philadelphia, Atlanta, Chicago, Los Angeles, and New York City caused vast

public disruption. Soldiers under federal command had to reopen the Philadelphia transit system in 1944. *See Atlanta Buses Running Again*, N.Y. Times, June 25, 1950, at 50 (Atlanta's transit strike); *Bus Strike Imperils Chicago's Transit*, N.Y. Times, Aug. 26, 1968, at 25 (Chicago strike); *Strike Halts Most Public Transit Runs in Philadelphia*, N.Y. Times, Mar. 26, 1977, at 8 (Philadelphia strike); *Transit Workers Strike Los Angeles Area Bus System*, N.Y. Times, Aug. 27, 1979, at A15 (Los Angeles and Cleveland strikes). And private businesses suffered over $100 million in losses daily during the twelve-day 1966 transit strike in New York City. Social and public-health harms also occurred. The city's blood supply for transfusions fell to a twenty-year low during the 1966 strike because people could not travel to hospitals to donate blood. The shortage of blood supply caused the postponement of nonemergency surgeries. *See Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33.

- Strikes by sanitation workers caused uncollected trash to pile up on city streets and threatened a serious public-health emergency in many cities. *See, e.g.*, *Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 33; *see also* Joseph F. Sullivan, *Mediators Seek to Settle Newark Sanitation Strike*, N.Y. Times, Dec. 29, 1976, at 55 (discussing strike in Newark, N.J.); Ziskind, *supra*, at 91-94 (recounting strikes by sanitation workers across the country).

- A strike by eight thousand welfare workers in New York City forced two-thirds of the city's

welfare centers to close for twenty-eight days in 1965, and led to the interruption of services to more than 500,000 welfare recipients, many of whom were children or elderly. *See* Joshua B. Freeman, *Working-Class New York: Life and Labor Since World War II* 205-06 (2001); *see also* Emanuel Perlmutter, *Welfare Strike Due in City Today Inspite of Writ*, N.Y. Times, Jan. 4, 1965, at 1. Strikes by workers at state mental hospitals also interrupted critical care for patients with mental illness. In 1968, a strike by mental-health workers at four state-run hospitals in New York forced patients to be sent home and led to a reduction in psychiatric treatment and rehabilitation services. *See* Donovan, *Administering the Taylor Law*, *supra*, 89-90 (1990); Damon Stetson, *Fourth Hospital Moves Patients*, N.Y. Times, Nov. 23, 1968, at 1. Care was also interrupted in Ohio in 1974 when half of the workers at the State's mental hospitals went on strike. *See* Louise Cooke, *Workers' Unrest Interrupts Municipal Service*, St. Petersburg Times, July 15, 1974, at 4-A.

As these examples illustrate, the harm of unresolved public-labor disputes is not confined to the "internal" operations of public employers. For state and local governments that employ workers to provide public services—many essential to the welfare of their citizens—the connection between labor peace and public welfare is direct and unavoidable. Many public services such as police and fire protection, sanitation, and public-health are provided uniquely by state and local governments, and absence of the services threatens serious irreparable harm to the

public. *See Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976), *overruled on other grounds, Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Even where there are private substitutes, state and local programs are often provided at no-cost (such as public education) or are heavily subsidized (such as public transportation). Disruption of these services harms the public generally but especially threatens the most vulnerable citizens—low-income persons or those who have a special need for government support. The harms of public-sector labor breakdowns are also difficult to predict or to control, and even short-term disruptions in particular services can have vast social and economic spillover effects. States thus have a compelling, ongoing interest in avoiding public-sector labor unrest.

B. In Responding To These Public Crises, States Naturally Looked To The Collective-Bargaining Model That Had Already Proven Effective In The Private Sector Under Federal Labor Law.

States crafted public-sector labor laws directly in response to concerns for the public welfare caused by the pattern of strikes and unrest by public employees.[13] A primary goal in establishing collective

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[13] *See, e.g.*, Ohio Legis. Serv. Comm., *Public Employee Labor Relations* 35-38 (1969) (discussion of strike activity nationwide and strikes in Ohio). See *infra*, note 16 (policy statements by States concerning their implementation of collective bargaining).

bargaining was to give public employees a voice in negotiating the terms and conditions of their employment in order to avoid and minimize the potential for strikes and other work stoppages that threatened state and local government operations and the provision of public services. *See, e.g.*, N.Y. Governor's Comm., *supra*, at 9, 42. Many States adopted collective bargaining for public employees only after careful study by expert committees or commissions charged with examining the underlying reasons for public-sector labor unrest and devising appropriate solutions.[14]

In devising labor-relations systems for public employees, States understandably looked to federal-law collective-bargaining solutions that had already proven effective in minimizing labor unrest in private industry.[15] Indeed, no alternative schemes had

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[14] *See, e.g.*, Milton Derber, *Labor-Management Policy for Public Employees in Illinois: The Experience of the Governor's Commission, 1966-1967*, 21 Indus. & Lab. Rel. Rev. 541, 549 (1968); *see also* Conn. Interim Comm'n to Study Collective Bargaining by Municipalities, *Final Report* 7-8 (1965); N.J. Pub. & Sch. Emps.' Grievance Procedure Study Comm'n, *Final Report* 6, 15-17 (1968); N.Y. Governor's Comm., *supra*, at 34-35, 41-42; Md. Dep't of Labor, Licensing & Regulation, *supra*, at 3-6; Mass. Legis. Research Council, *supra*, at 8-11; Mich. Advisory Comm. Public Employee Relations, *Report to Governor* (1967), *reprinted in* Gov't Emp. Relations Report, No. 181 (Feb. 28, 1967); Pa. Governor's Comm., *supra*, at ii, 1.

[15] *See, e.g.*, Harry T. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L. Rev. 885, 932 (1973) (noting "accelerating" trend among States towards using "private sector principles to guide the development of labor relations in the public sector"); N.J. Pub. & Sch. Emps.', *supra*, at 15 ("As experience in private employment suggests, stable

(*continues on next page*)

proven both workable and effective in diminishing labor unrest. As a result, every State that established collective bargaining for state and local public employees provided for bargaining under the exclusive-representation model that Congress had adopted for private-sector bargaining. See *supra* note 3 & Appendix. Many States also authorized agency-fee payments, as Congress did, as an adjunct to exclusive representation. See *supra* note 4 & Appendix.

The goal of adopting these elements of private-sector collective bargaining was not simply to maximize efficiency, but rather to devise an effective and fair bargaining system that assured public-sector labor stability for the benefit of the *public* that depended on government services and operations. *See, e.g.*, N.Y. Civ. Serv. Law § 200 (fundamental aim was to regulate public-sector labor relations to "protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government"); Iowa Code § 20.1 (state policy is to authorize collective bargaining for public employees

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negotiating relationships will benefit both public employees and the general public"); N.Y. Governor's Comm., *supra*, at 20-21, 29 (acknowledged that framework for collective bargaining in public sector could be modeled on "the methods developed since 1935 in the private sector"); Russell A. Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 Mich. L. Rev. 891, 897, 899, 901, 904 (1968) (noting that various state commissions relied on NLRA and other private-sector models in offering recommendations for public-sector labor relations policy in the State); Stieber, *supra*, at 212 (stating that public-sector collective bargaining followed the pattern in the private sector).

to "protect the citizens of this state by assuring the effective and orderly operations of government").[16]

Petitioners have pointed to no effective model of collective bargaining in the United States—actually tested in practice and by wide application—that dispenses with the concept of exclusive representation by a single selected union that is obligated to represent all employees in negotiations with the employer over the term and conditions of employment. And while there is some variation in the use of agency-fee payments, the use of such payments is closely connected to the goal of ensuring effective collective bargaining and thereby promoting labor peace.

Agency-fee provisions promote stable and secure funding for unions by eliminating the "free-rider" problem that arises when employees can benefit from union efforts in collective bargaining without having to share in the costs of such efforts. *See* Mancur Olson, *The Logic of Collective Action* 84-87 (1965). Contrary to the suggestions of petitioners and their amici, the interest in avoiding free riders is not about

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[16] *See also* Del. Code tit. 19, § 1301 (collective bargaining system for public employees is designed to "to protect the public by assuring the orderly and uninterrupted operations and functions" of government); Fla. Stat. § 447.201 (same); Kansas Stat. § 75-4321(3) (same); Neb. Revised Stat. §§ 48-802 & 81-1370 (same)); Or. Rev. Stat. § 243.656 (permitting collective bargaining "safeguards . . . the public from injury, impairment and interruptions of necessary services, and removes certain recognized sources of strife and unrest"); Vt. Stat. Ann., tit. 3, § 901 (purpose and policy of state employees labor relations act is "to protect the rights of the public in connection with labor disputes").

ensuring, for its own sake, that workers do not obtain a benefit from the union free of charge. It is instead about addressing the collective-action problem that arises when opportunities for free-riding lead individuals not to pay for activities that provide a common benefit. Agency-fees promote more than simple fairness: they address the risk that employees as a whole would fail to adequately support the union's collective-bargaining activities, if there were no secure mechanism for charging employees a share of the cost of those activities. Just as in other situations where individual free-riding distorts and impairs the adequate provision of collectively beneficial services, in the exclusive-representation context, the temptation for employees to free ride threatens the ability of unions to secure adequate funding to fulfill their responsibilities.

The States' interest in agency fees is not about punishing or restraining individual employee free-riding, but is fundamentally a labor-peace interest in avoiding the well-known, systematic effects of unchecked free ridership, effects that jeopardize the union's intended function and thus hamper the effectiveness of collective bargaining in achieving labor peace. Secure funding assists unions in fulfilling their significant responsibilities under an exclusive-representation system in many ways: (1) fairly apportioning costs to all represented employees ensures that unions may obtain the substantial resources they often need to adequately fulfill their exclusive-representation responsibilities, *Abood*, 431 U.S. at 221; (2) absence of secure funding may create skewed incentives for unions to make excessive bargaining demands or disparage management as antagonistic to labor to convince employees to give

financial support, Patricia N. Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev. 183, 189 (1975); and (3) likewise, eliminating agency fees as a secure funding mechanism may require unions to focus disproportionate effort on recruiting members and collecting fees, thereby diverting attention from their bargaining and contract-administration responsibilities.[17] See A.L. Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. Indus. & Com. L. Rev. 993, 1012 (1975). *Abood* appropriately authorizes States to authorize agency fees to prevent the systematic harms of free-riding from undermining the benefits of collective bargaining for achieving labor peace and stability.

II. The Variation in Public-Sector Collective Bargaining Laws Does Not Undermine *Abood*, But Rather Confirms the Validity of Its Flexible Framework.

Petitioners argue that the fact that not all States authorize agency fees, and that the federal government does not authorize them for federal employees, fatally undermines *Abood*'s analysis. *See* Pet Br. 36. But their argument misunderstands

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[17] States could also conclude that authorizing agency fees furthers labor peace by eliminating the resentment and infighting caused by some employees not contributing to union expenses while benefitting from union efforts funded by their coworkers. *See, e.g., Ellis v. Ry., Airline & S.S. Clerks*, 466 U.S. 435, 452 (1984) (allowing free-riding corrodes workplace harmony and cooperation by "stirring up resentment" because some employees can "enjoy[] benefits earned through other employees' time and money").

Abood. *Abood* is more than a yes-or-no decision about agency fees. Its broader holding is that States should have leeway to devise labor-relations systems best suited to individual state circumstances and policy decisions. *Abood* recognizes that the task of crafting a workable labor relations system is complex and difficult and requires balancing numerous interests—in areas where there is widespread debate and no clear answer. As a result, *Abood* does not mandate that any State enact any particular labor-relations law. It leaves States free to devise systems based on their own history and particular policy choices, and it gives voters in each State the ultimate say over changes or amendments to labor policy. *See Abood*, 431 U.S. at 224-25 & n.20.

The flaws in petitioners' argument run deeper still. They not only wrongly dismiss the importance of the flexibility preserved by *Abood*, but also propose to constitutionalize a model of collective bargaining that is largely untested in the United States. Petitioners challenge not only agency-fee payments, but also the concept of exclusive representation in collective bargaining, and its associated requirement that a designated union fairly represent all employees in the bargaining process. *See* Pet Br. 23-24, 35. But petitioners' hypothetical alternatives to exclusive representation have not been tested in the real world, and certainly have not been tested on any scale that could justify imposing them as a constitutional requirement for nearly seven million state and local employees covered by existing state collective-bargaining laws. *See* U.S. Bureau of Labor Statistics, News Release, Union Members—2012, tbl. 3 (Jan. 23, 2013), *available at* http://www.bls.gov/news.release/pdf/union2.pdf. Exclusive representation is a core

element of private-sector collective bargaining, and has been universally adopted by every State that statutorily authorizes public-sector bargaining. Petitioners' real claim is that States should be constitutionally compelled to experiment with unproven alternatives in structuring the labor relations of state and local governments, at risk of repeating past public crises resulting from public-sector labor unrest. This Court has never interpreted the limited First Amendment rights of public employees as imposing those enormous public costs. See *infra*, at III.

Moreover, although there is variation in use of agency fees, agency-fee provisions remain a widely adopted model for ensuring that unions will effectively fulfill their exclusive-representation duties. Some public-sector labor schemes that decline to permit agency fees also circumscribe the scope of collective bargaining in public employment.[18] Petitioners' alternate model does not establish that a more-comprehensive system of collective bargaining is widely achievable without allowing agency fees. Federal law, for example, allows federal workers to unionize under an exclusive-representation model, without permitting agency fees, but also specifically

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[18] *See, e.g.*, Wis. Stat. § 111.91(2)-(3) (prohibiting collective bargaining for state employees over designated subjects and limiting bargaining over wage increases); *see also* Kearney, *supra*, at 55-70 (noting that while many States follow the NLRA model by authorizing "a broad scope of negotiations over wages, hours and other terms and conditions of employment," the details and scope of state public-sector "bargaining provisions vary greatly").

exempts federal agencies from any obligation to bargain over wages, number of employees, or other key issues covered by broader state collective-bargaining regimes. 5 U.S.C. § 7106(a)(1). *See also Navy Charleston Naval Shipyard v. Fed. Labor Relations Auth.*, 885 F.2d 185, 187 (4th Cir. 1989) (federal law regulates federal-employee labor relations by cordoning off important management prerogatives and making union proposals touching on those matters nonnegotiable).

Likewise, many of the States identified by petitioners that do not authorize agency fees—sometimes referred to as "right-to-work" States—have also made fundamentally different choices about the role and scope of collective bargaining. Many of those States deny public employees the right to collectively bargain at all, or limit collective bargaining to only a few classes of employees.[19] The "right-to-work" States have thus made a foundationally different policy choice about labor relations for

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[19] *See, e.g.*, Texas Gov't Code § 617.002(a) (barring state and local government officials from "enter[ing] into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees"); *see also* Ala. Code § 25-7-31; N.C. Gen. Stat. § 95-98; S.C. Code Ann. § 41-7-20; Va. Code § 40.1-57.2; Tenn. Code Ann. §§ 49-5-610 to -613 (repealing right to collectively bargain).

Five States permit collective bargaining for only a subset of public sector employees. *See* Ariz. Rev. Stat. Ann. § 23-1411 (permitting collective bargaining for public-safety employees); Ark. Code Ann. § 6-17-202(b) (permitting collective bargaining only for school teachers); La. Rev. Stat. Ann. § 23:890(B) (collective bargaining for municipal public transit employees); Ind. Code § 20-29-4-1 (school employees may collectively bargain); Utah Code Ann. § 34-20a-3 (firefighters may collectively bargain).

state and local government workers. *See* Kearney, *supra*, at 65 (explaining that in States that do not permit collective bargaining, the Legislature made a "calculated choice" to provide a "'good business climate' by holding down public employee compensation"). Those States' differing policy choices may well be appropriate to their particular circumstances, but they do not refute the benefit of agency fees for other States that adopt more comprehensive public-sector collective bargaining. And certain States with general right-to-work laws nonetheless authorize agency-fee agreements for some classes of public workers, such as firefighters and police officers, confirming that varied approaches to public-sector collective bargaining are appropriate and that no single template should be imposed as constitutionally mandated.[20]

Indeed, far from reflecting a uniform judgment about the efficacy of agency fees, much of the variation in public-sector labor laws can be explained by historical experience and differing circumstances. Many of the right-to-work States suffered no history of public-sector labor unrest or a much milder history than States with broader public-sector collective bargaining and authorization for agency fees. *See* Kearney, *supra*, at 65 & 73-74; *see also* Stieber, *supra*, at 161. Similarly, there have been far fewer strikes and work stoppages by federal employees than by state and local government workers, *see*

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[20] *See* Mich. Comp. Laws § 423.210(4) (exempting police, firefighters, and state troopers from general prohibition on agency-fee agreements); Wis. Stat. §§ 111.81(9), 111.845, 111.85 (exempting "public safety employees" from restrictions on "fair-share agreements").

Kearney, *supra*, at 226-27, potentially explaining why federal collective-bargaining rules differ. Many economic, political, and demographic factors may contribute to such historical differences. When it is properly understood, the variation in approaches to public-sector collective bargaining does not undermine *Abood*, but rather confirms its wisdom in giving States discretion to implement different collective-bargaining rules based on differing state experiences, budgetary conditions, economic and demographic factors, and policy judgments.

III. The First Amendment Does Not Prohibit States from Borrowing Effective and Widely Accepted Private-Sector Collective-Bargaining Models to Regulate Public-Sector Labor Relations.

Finally, petitioners and their amici argue that collective bargaining in the public sector implicates the dual role of government as both "employer and policy-maker" and that, as a result, state collective-bargaining laws should be subject to heightened First Amendment scrutiny. *See* Pet. Br. 23. But the fact that collective-bargaining concerns the role of state and local governments *as employers* supports *Abood*'s holding.

Abood's grant of deference to state judgments about labor-relations policy is not an anomaly in First Amendment law. Deference accords with this Court's public-employee speech cases affording government broad authority to terminate or discipline employees for protected speech in order to promote the effectiveness of government operations. This Court has consistently upheld the government's authority to manage public employees and regulate

the terms of public employment to promote the effective and efficient delivery of government services and programs. *See, e.g., Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 598-600 (2008); *Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006); *Waters v. Churchill*, 511 U.S. 661, 671-75 (1994) (plurality op.).

The Court's public-employee speech cases afford extensive deference to the government in structuring the public-employment relationship—giving "substantial weight" to government predictions of harm and disruption, "even when the speech involved is a matter of public concern."[21] *Waters*, 511 U.S. at 673-74 (plurality op.). This Court has acknowledged that, in many cases, a "respectable argument" could be made in favor of policies that would be more protective or accommodating to public employees' speech and associational rights. *Id.* at 673. But the Court has repeatedly declined to deny the govern-

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[21] Petitioners (Br. 28-31) improperly propose to use the "public concern" test from this Court's public employee-speech cases to eliminate deference to state governments in structuring public-sector labor relations. Petitioners' argument, however, inverts the original function of the "public concern" test, which holds that speech by a public employee must relate to a matter of public concern to receive any First Amendment protection at all. Even as to matters of public concern, this Court has affirmed that the government's interest in protecting the provision of public services and fulfilling its public responsibilities outweighs an individual employee's interest in speaking.

The "public concern" test therefore does not define the outer boundary of government authority in structuring the employment relationship, but instead triggers a balancing test that is deferential to the government's assessment of how to protect the efficient and effective provision of services by government workers.

ment reasonable flexibility to fulfill "its mission as employer" for the public good, and accordingly rejected any notion that employment-related measures must be "narrowly tailored to a compelling government interest." *Id.* at 674-75.

Abood is fully consistent with these cases: it authorizes exclusive representation and agency fees for collective bargaining as part of the public-employment relationship, and it makes clear that public employees may not be compelled to support political or ideological activities by unions outside of the collective-bargaining process. The deference that *Abood* extends to state labor relations and collective-bargaining laws is therefore appropriately centered on government's decisions in structuring negotiations as to the terms and conditions of public employment, not restricting public employees from expressing themselves or associating freely in their capacities as citizens.

Petitioners note that the majority of this Court's prior public-employee speech cases involved individual employees and the potential for disruption in individual workplaces. *See* Pet. Br. 28. But this Court has also upheld state and federal statutes broadly regulating the political activity of public employees *as a class*—confirming that "[e]ven something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees." *Waters*, 511 U.S. at 672 (plurality op.) (citing cases). The States' interest in public-sector labor peace is deepened, not diminished because the threat of disruption extends far beyond any single employee or individual workplace.

Labor peace and stability is a broad problem, but the breadth of the government interest does not

justify enhanced restrictions on the government's ability to regulate labor relations and to borrow solutions found effective for achieving labor peace in the private sector. This Court has long confirmed that the First Amendment is not a mandate for lesser public efficiency. When the "government is employing someone for the very purpose of effectively achieving its goals," *id.* at 675, it is permitted flexibility to control its own operations and to define the terms of employment to serve its ends just as "private employers" do. *See Garcetti*, 547 U.S. at 418. And when an individual "enters government service," he or she "must accept certain limitations on his or her freedom," including limitations that would be imposed in a private employment setting. *Id.* These limitations may and often do restrict speech or associational activities that the government could not limit outside of the employment relationship.

It is petitioners' argument, not *Abood*, that is out of step with First Amendment doctrine. The Court has never suggested that the First Amendment prohibits public employers from adopting measures that have been found broadly effective for securing effective and efficient operations for private employers. *Abood* upholds only the right of States to mirror federal policy for effective collective bargaining and to adopt collective-bargaining schemes of tested efficacy and widespread application in the private sector. Almost every State in the Nation has adopted some features from private-sector collective bargaining for public-sector labor laws which those States deem critical to assuring labor peace and stability. Nothing in this Court's large body of public-employee First Amendment precedent prohibits that choice or supports upending long-settled state laws

governing collective bargaining by state and local employees.

CONCLUSION

This Court should decline to overrule *Abood*.

Respectfully submitted,

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Appendix

Survey of State Statutory Authority for Public-Sector Collective Bargaining by Exclusive Representative*

Alabama	No statutory authority
Alaska *Alaska Stat.*	*Public Employees* – §§ 23.40.100, **23.40.110**
Arizona	No statutory authority
Arkansas *Ark. Code Ann.*	*Teachers* – § 6-17-202
California *Cal. Gov't Code*	*Local Government Employees* – **§ 3502.5** *State Employees* – §§ 3515.5, **3515.7** *School Employees* – §§ 3543-3543.2, **3546** *Higher Education Employees* – **§§ 3583.5**, 3584 *Home Care Providers* – **§ 110019**

**Citations in bold indicate authorization for agency or fair-share fees. Some States combine authority for collective-bargaining and for fees in a single statutory provision.*

Colorado *Colorado Rev. Stat.*	*Public Mass Transportation System Employees* – § 8-3-107
Connecticut *Conn. Gen. Stat.*	*Municipal Employees* – §§ 7-468 to -69 *State Employees* – §§ 5-271, **5-280** *Teachers* – § **10-153a** *Family Child Care Providers* – § **17b-705a** *Personal-Care Attendants* – § **17b-706b**
Delaware *Del. Code Ann. [tit.], [§]*	*Public Employees* – 19, §§ 1303-1304, **1319** *Police Officers & Firefighters* – 19, §§ 1603-1604 *Public School Employees* – 14, §§ 4003-4004, **4019**
District of Columbia *D.C. Code*	*Public Employees* – §§ 1-617.10, 1-617.11, **1-617.07**
Florida *Fla. Stat.*	*Public Employees* – § 447.307
Georgia *Ga. Code Ann.*	*Firefighters* – § 25-5-5 Collective-Bargaining Restriction on Teachers – § 20-2-989.10

Hawaii *Haw. Rev. Stat.*	*Public Employees* – §§ **89-3**, **89-4**, 89-8
Idaho *Idaho Code Ann.*	*Teachers* – § 33-1273 *Firefighters* – § 44-1803
Illinois *[ch.] Ill. Comp. Stat. Ann. [§]*	*Public Employees* – 5, § **315/6** *Educational Employees* – 115, §§ 5/3, 5/10, **5/11** *Home Care & Home Health Workers* – 20, § **2405/3**
Indiana *Ind. Code*	*Employees of Correctional Institutions* – § 11-10-5-5 *Employees of State Institutions* – § 12-24-3-5 *Employees of Soldiers' & Sailors' Children's Home* – § 16-33-4-23 *Employees of the Schools for the Blind and for the Deaf* – §§ 20-21-4-4, 20-22-4-4 *Employees of a School Corp. or Charter School* – § 20-26-5-32.2 *Teachers* – §§ 20-29-2-9, 20-29-5-2 *Some Local Public Safety Employees* – § 36-8-22-7
Iowa *Iowa Code*	*Public Employees* – § 20.16

Kansas *Kan. Stat. Ann.*	*Teachers* – § 72-5415
Kentucky *Ky. Rev. Stat. Ann.*	*City & Local Government Firefighters* – §§ 345.030, 345.040 *Local Government Police Officers* – §§ 67C.402, 67C.404 *Urban-County Police Officers, Firefighter Personnel, Firefighters & Corrections Personnel* – §§ 67A.6902, 67A.6903 ***Housing Auth. of Louisville v. Serv. Emp. Int'l Union, Local 557***, 885 S.W.2d 692, 696-97 (Ky. 1994) (upholding fair-share fees)
Louisiana	No statutory authority
Maine *Me. Rev. Stat.[tit.][§]*	*Municipal Employees* – 26, §§ **629**, **963**, 965, 967 *State Employees* – 26 §§ **979-B**, 979-D, 979-F *University of Maine Employees* – 26 §§ 1023, 1025, 1026 *Judicial Employees* – 26 §§ **1283**, 1285, 1287

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Massachusetts *Mass. Gen. Laws* *[ch.], [§]*	*Public Employees* – 150E, §§ **2**, 4,5, **12** *Child Care Providers* – 15D, § 17 *Personal Care Attendants* – 118E, § 73
Michigan *Mich. Comp.* *Laws Ann.*	*Public Employees* – §§ 423.26, **423.210**, 423.211, *Public Police & Fire Dep't Employees* – § 423.234 *State Police Troopers & Sergeants* – § 423.274
Minnesota *Minn. Stat.*	*Public Employees* – § **179A.06** *Individual Providers* – § **256B.0711**
Mississippi	No statutory authority

Missouri *Mo. Rev. Stat.*	*Public Employees* – §§ 105.510, **105.520; *Schaffer v. Bd. of Educ.***, 869 S.W.2d 163, 166 (Mo. Ct. App. 1993) (finding implicit authority for fair-share provisions in § 105.520) *Personal Care Attendants* – § 208.862
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New Hampshire *N.H. Rev. Stat. Ann.*	*Public Employees* – §§ **273-A:3**, 273-A:11; ***Nashua Teachers Union v. Sch. Dist.***, 707 A.2d 448, 451-52 (N.H. 1998) (§ 273-A:3(I) permits negotiation of agency fees)
New Jersey *N.J. Stat. Ann.*	*Public Employees* – §§ 34:13A-5.3, **34A:13A-5.5**, **34:13A-5.6**

New Mexico *N.M. Stat. Ann.*	*Public Employees* – §§ **10-7E-9**, 10-7E-15 *Family Child Care Providers* – § 50-4-33
New York *N.Y. [subject] Law*	*Public Employees* – Civ. Serv. §§ 204, **208** *Child Care Providers* – Lab. § 695-d
North Carolina *N.C. Gen. Stat.*	Public-sector collective-bargaining restriction – § 95-98
North Dakota *N.D. Cent. Code*	*Meet and Confer Authorization for Teachers* – § 15.1-16-13
Ohio *Ohio Rev. Code Ann.*	*Public Employees* – §§ 4117.04, 4117.05, **4117.09**
Oklahoma *Okla. Stat. Ann. [tit.] [§]*	*Municipal Firefighters & Police Officers* – 11 § 51-103 *Rural Fire Protection District Firefighters* – 19 § 901.30-2 *School Employees* – 70 § 509.2
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Rhode Island *R.I. Gen. Laws*	*State Employees* – §§ **36-11-2**, 36-11-7 *Employees, including Public Employees* – § 28-7-14 *Municipal Firefighters* – § 28-9.1-5 *Municipal Police Officers* – § 28-9.2-5 *Teachers* – § 28-9.3-3; ***N. Kingstown v. N. Kingstown Teachers Ass'n***, 297 A.2d 342, 346 (R.I. 1972) (fair-share fees permissible) *Municipal Employees* – § 28-9.4-4 *State Police* – § 28-9.5-5 *Statewide 911 Employees* – § 28-9.6-5 *State Correctional Officers* – § 28-9.7-5 *Family Child Care Providers* – §§ 40-6.6-2, 40-6.6-4

South Carolina	Public sector collective bargaining restriction
South Dakota *S.D. Codified Laws*	*Public Employees* – § 3-18-3
Tennessee *Tenn. Code*	*Meet and Confer Authorization for for Local Public-School Teachers* – § 49-5-608
Texas *Tex Gov't Code Ann.*	Public-sector collective-bargaining restriction – § 617.002
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West Virginia	No statutory authority
Wisconsin *Wis. Stat.*	*Public Safety Officers* – §§ **111.81**, 111.82, **111.85**, 111.825, 111.83
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AMICUS CURIAE BRIEF

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No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* THE PARAPROFESSIONAL HEALTHCARE INSTITUTE (PHI) IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

Founded in 1992, the Paraprofessional Healthcare Institute (PHI) is the nation's leading authority on the direct-care workforce. With offices in New York, Michigan, and Washington, D.C., PHI fosters dignity, respect, and independence—for all who receive care and all who provide it.

PHI works with employers, consumers, labor advocates, and government officials to develop recruitment, training, supervision, and person-centered caregiving practices and policies.

PHI is the nation's primary source for direct-care workforce news and analysis—anchored at www.PHInational.org. PHI's State Data Center online resource (http://phinational.org/policy/states/) provides up-to-date profiles of the direct-care workforce in all 50 states, including key workforce statistics, information on state initiatives to improve these jobs, and state-by-state information on training requirements.

SUMMARY OF ARGUMENT

This Court has long recognized that a state's choice about how to handle the provision of public services warrants substantial deference. In

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[1] Letters from the parties consenting generally to the filing of briefs *amicus curiae* are on file with the Court. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

particular, it has accorded states wide latitude in deciding how to manage the workforce that provides those services.

Petitioners characterize themselves as individuals who "participate" in a "public aid program," Petr. Br. 14, but that description is misleading. Petitioners are not mere private citizens receiving a state subsidy to pursue their private goals. Rather, they are part of a workforce paid by the State of Illinois to carry out a vital state function: providing assistance to disabled individuals through the Medicaid program. Illinois has determined that it can often best provide that assistance through home-based programs in which it delegates significant decisionmaking authority to beneficiaries. But it can achieve that goal only if it can develop a workforce large enough, stable enough, and skilled enough to meet its overall program needs. Illinois had a strong empirical basis for concluding that offering collective bargaining to the publicly funded workforce that implements its Medicaid program can contribute to developing the necessary workforce.

1. Like many states, Illinois is innovating how it provides state-funded, long-term care. Both to enhance the dignity and autonomy of Medicaid beneficiaries and to provide cost-effective service, Illinois has chosen to provide care to many Medicaid beneficiaries in their homes rather than in institutions, and to delegate to those beneficiaries a degree of control over how that care is provided. Yet the state also retains significant control over the employment terms of workers who provide this care. Petitioners wrongly imply that a state's role must be all or nothing. To the contrary: A state does not

forfeit its preexisting authority to manage its internal operations by adopting policies that improve that operation.

2. If anything, consumer-directed home-based care reinforces the need for active state involvement in managing the provider workforce. In the face of a disorganized market, states face an accelerating crisis in finding and retaining homecare workers. The nature of the work makes it hard to attract personnel in the first place, and those who do enter the field turn over at an alarming rate. Half of all beneficiaries change providers each year.

Left unremedied, this turnover poses significant costs for both the state providing care and the beneficiaries receiving it. And the state cannot rely on beneficiaries or individual providers to solve the problem. Neither individual low-income Medicaid beneficiaries nor individual low-income aides have the expertise, the resources, or the incentives to address labor market imperfections.

3. Though states could choose to attack the labor supply issue unilaterally, many states, including Illinois, have decided instead that cooperative labor-management solutions are more promising. Illinois reasonably relied on longstanding experience to conclude that unionization could enable the state to capture the benefits of a consumer-directed model while also retaining many benefits of a more structured work relationship.

ARGUMENT

I. States Have A Strong Interest In Managing How They Provide Long-Term Homecare To Disabled And Elderly Residents.

Petitioners challenge one aspect of a state-designed, state-managed, and state-funded Medicaid program: the state's decision to offer collective bargaining to the workers who implement that program. But the state's decision did not arise in a vacuum.

For decades, states have provided care to low-income citizens who are elderly or disabled through Medicaid. Medicaid allows states substantial leeway in designing and managing their programs, so that states can take account of their distinctive needs and resources. Not surprisingly, state Medicaid programs illustrate Justice Brandeis's famous observation that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As the Federal Government explains, "[w]hat state Medicaid programs have most in common is that they are all different."[2]

To understand why Illinois acted reasonably in offering collective bargaining to line-level Medicaid-

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[2] Janet O'Keeffe et al., U.S. Dep't of Health & Human Servs., *Understanding Medicaid Home and Community Services: A Primer* 16 (2010) [hereinafter *Medicaid Primer*], *available at* http://tinyurl.com/PHI-primer.

funded personnel requires understanding why states have moved to consumer-directed, home-based care for low-income citizens who otherwise face difficulties living on their own. States have found that such care not only protects citizens' dignity and autonomy, but also that it is cost effective.

A. States Increasingly Provide Long-Term Care In Beneficiaries' Homes To Reduce Isolation And Save Resources.

For persons who require Medicaid-funded long-term care, many states are shifting away from institutional care, which can isolate individuals from their families and communities, and towards home-based care.

Federal law has contributed to this shift. In 1983, Congress took a first step by waiving the pre-existing requirement that Medicaid-funded care be provided in institutions.[3] It later formally authorized states to offer "home- and community-based services" as part of state Medicaid programs.[4] Subsequent legislation created additional incentives to move toward home-based care. For example, the Americans with Disabilities Act of 1990, as interpreted by this Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999), gave persons with disabilities a

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[3] Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2175-2176, 95 Stat. 357, 809-12 (codified as amended at 42 U.S.C. § 1396n).

[4] Deficit Reduction Act of 2005, Pub. L. No. 109-171, §§ 6085-6086, 120 Stat. 4, 121-127 (codified as amended at 42 U.S.C. § 1396n).

statutory right to be placed whenever feasible in community settings rather than institutions.[5] Then the Deficit Reduction Act of 2005 provided funds for Money Follows the Person demonstrations that pay states an enhanced federal matching rate for each person transitioned from an institution to the community.[6] And the Patient Protection and Affordable Care Act of 2010 provided new options for states to increase the availability of home- and community-based services.[7] All states now offer some form of home-based care.[8]

Beyond the federal incentives, states have strong independent reasons to offer home-based care. Providing care in a beneficiary's own home maximizes autonomy and dignity. Public opinion studies have consistently shown that roughly 85% of Americans would prefer to receive long-term care at home.[9] Indeed, in one sample of seriously ill

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[5] The *Olmstead* Court interpreted the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, along with its implementing regulation, 28 C.F.R. § 35.130(d).

[6] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6071, 120 Stat. 4, 102-10.

[7] *See generally* Carol V. O'Shaughnessy, Nat'l Health Policy Forum, *Medicaid Home- and Community-Based Services Programs Enacted by the ACA: Expanding Opportunities One Step at a Time* (2013), *available at* http://tinyurl.com/PHI-ACA.

[8] Medicaid Primer, *supra*, at 22.

[9] *See, e.g.*, AARP, *Beyond 50.05 Survey* 9 (2005), *available at* http://tinyurl.com/PHI-AARP1 (finding that 84% of persons 50 or older want to stay in their own home for "as long as possible"); AARP, *Home and Community Preferences of the 45+ Population* 3 (2010), *available at* http://tinyurl.com/PHI-AARP2

hospitalized adults, 30% reported that they would "rather die" than live permanently in a nursing home; a further 37% reported that they were "unwilling" to do so.[10]

The literature is filled with examples that explain this preference. Consider Walter Brown. Mr. Brown suffered a stroke in 2007 and was placed in a nursing home. "It was like being in jail," Mr. Brown said. "In the nursing home you've got to do what they say when they say it, go to bed when they tell you, eat what they want you to eat." But when the state provided the opportunity to return home, it made him "more confident in [him]self," and "in the future."[11]

Not only does home-based care promote autonomy and dignity, but it is cost effective as well. The cost of 24/7 care in a nursing facility can be "astronomical."[12] State studies consistently find far lower average costs per individual in home- and community-based settings.[13] A 2011 study estimated

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(finding that 86% of persons 45 or older agreed with the statement that they would "really like" to "stay in [their] current residence for as long as possible").

[10] T.J. Mattimore et al., *Surrogate and Physician Understanding of Patients' Preferences for Living Permanently in a Nursing Home*, 45 J. Am. Geriatrics Soc'y 818 (1997).

[11] John Leland, *Helping Elderly Leave Nursing Homes for a Home*, N.Y. Times, Sept. 19, 2009, at A10, *available at* http://tinyurl.com/PHI-NYT.

[12] Nat'l Consumer Voice for Quality Long-Term Care, *Consumer Perspectives on Quality Home Care* 16 (2012), *available at* http://tinyurl.com/PHI-NCV.

[13] Wendy Fox-Grage & Jenna Walls, AARP Pub. Policy Inst., *State Studies Find Home and Community-Based Services*

the annual cost saving of a move from institutional care to home- and community-based settings was $57,338 per person.[14]

B. States Increasingly Grant Beneficiaries Some Choice Over State-Funded Service Providers.

More recently, states have modified their programs in a second significant respect: offering consumer- or participant-directed services as an alternative to the traditional model in which agencies set the parameters of service delivery. Consumer direction began with the Independent Living movement in the 1970s when "individuals with disabilities demanded greater control over the services they receive in the community."[15] Today, almost every state has added a beneficiary-directed component to its Medicaid program.[16]

States can delegate a variety of decisions to beneficiaries. A commonly delegated choice involves selecting the direct-service provider. In Illinois, for example, beneficiaries are given wide latitude within

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to Be Cost-Effective (2013), *available at* http://tinyurl.com/PHI-Fox-Grage.

[14] Charlene Harrington et al., *Do Medicaid Home and Community Based Service Waivers Save Money?*, 30 Home Health Care Servs Q. 198, 198 (2011).

[15] Henry Claypool & Molly O'Malley, Kaiser Comm'n on Medicaid & the Uninsured, *Consumer Direction of Personal Assistance Services in Medicaid: A Review of Four State Programs* 1 (2008), *available at* http://tinyurl.com/PHI-Claypool.

[16] Medicaid Primer, *supra*, at 177.

state-set limits to choose the individual who comes to their home to provide support and services. Pet. App. 3a.

Consumer choice furthers patients' autonomy and dignity in obvious ways. For those individuals who have strong feelings about who should enter their home and who should provide services that often intrude on personal privacy, "[p]articipant direction has been demonstrated to promote positive outcomes for individuals and their families, improve participant satisfaction, and increase access to needed services."[17]

As with home-based care more generally, the literature supports this common-sense conclusion. Consider Calvin Dodson. Dodson was blinded by an automobile accident and also required dialysis three times per week. Under an agency model, he "got a different worker every week." He was "always having to explain everything from the beginning, every time." And the workers the agency sent "never wanted to do the jobs [he] needed them to do."[18] By allowing beneficiaries to hire their own providers, beneficiaries may be able to secure greater continuity of care and better opportunities to select and help train a compatible personal care aide.

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[17] Medicaid Primer, *supra*, at 177.

[18] Robert Wood Johnson Found., *Choosing Independence: An Overview of the Cash & Counseling Model of Self-Directed Personal Assistance Services* 40-41 (2006), *available at* http://tinyurl.com/PHI-RWJF.

Consumer-directed care can also be cost effective. For example, beneficiaries may be in a better position than the state to determine which potential provider is the best match for them. When states share with program beneficiaries the process of selecting and assigning providers, they can reduce the number of poor matches that result in turnover and less effective care.

But while states delegate some decisions to beneficiaries, they retain significant control over many important terms of employment. In Illinois, the state continues to set job duties, wage rates, and worker qualifications. And it continues to pay workers directly. Pet. App. 3a.

And while recent innovations have decentralized the locations at which Medicaid services are provided and devolved aspects of the selection process to beneficiaries, the day-to-day work remains quite similar to the work previously provided within nursing facilities.[19] Like their predecessors in institutional settings, the personal care aides whose work is at issue in this case assist with essential daily supports and services, such as eating, dressing, using the bathroom, managing prescription medications, and ambulation.[20] At the same time, now that the beneficiaries remain at home, aides assist with running errands, traveling to doctor appointments, and better enabling an active family

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[19] Dorie Seavey, *Caregivers on the Front Line: Building a Better Direct-Care Workforce*, Generations, Winter 2010-11, at 27-28, *available at* http://tinyurl.com/PHI-Seavey1.

[20] *Id.* at 28.

and community life—for instance, by helping a beneficiary to attend religious services or social gatherings. Particularly for elderly beneficiaries, social supports help ensure that their cognitive states do not deteriorate from isolation.[21]

C. Contrary To Petitioners' Argument, A State's Decision To Innovate In How It Provides Medicaid Does Not Deprive The State Of Its Managerial Role.

At its core, petitioners' argument is that if the state allows Medicaid beneficiaries to stay in their homes and play a role in choosing who provides Medicaid-funded personal services, the state's role and interest in these programs becomes "quite limited." Petr. Br. 7.

Not so. As a descriptive matter, states like Illinois retain immense control over most aspects of how they provide services under Medicaid. They decide eligibility for services. They decide which services to provide. They decide the minimum qualifications required for workers providing those services. And they decide those workers' pay rates and hours. Pet. App. 3a.

It makes no sense to suggest that a state has somehow forfeited its ongoing ability to "'manage [its] internal operation,'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (alteration in original) (citation omitted), by adopting policies that improve that operation. The very reason states decided to

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[21] *Id.*

offer services at beneficiaries' homes and to share some decisionmaking authority with beneficiaries is because those innovations further vital *state* interests in dignity and efficiency—not because the state is uninterested in how a huge portion of its budget gets spent.

To be sure, there is a market for homecare services where the state's role and interests are indeed "quite limited." That is the private market in which individuals seeking services pay for those services themselves and negotiate the terms of employment within the private labor market's broad constraints. Petitioners were free to offer their services in that market if they preferred the terms and conditions available there. Instead, they chose a state paycheck. It is petitioners, and not the state, who are seeking to have it both ways. They want the state to pay them without their being treated as state providers and without their needing to conform to the personnel system that the state has established to accomplish its programmatic goals. But their preferences cannot override the state's right to run a publicly funded, highly regulated program in the manner that the state reasonably believes allows that program to best accomplish its objectives.

II. States Face Significant Labor Market Problems In Building And Stabilizing The Homecare Workforce Their Medicaid Programs Demand.

The success of a state's transition to a home-based, consumer-directed Medicaid program depends on the availability of a pool of skilled and dependable workers. Yet states face an accelerating crisis in

finding and keeping such workers. That crisis has several dimensions. But one thing is clear: given the structure of consumer-directed homecare, the state must necessarily be an active participant in recruiting and retaining workers if it wishes to provide such services to all who might qualify and benefit. Individual Medicaid beneficiaries have neither the ability nor the incentive to build that workforce.

A. States Confront A Severe And Worsening Shortage Of Homecare Workers.

The Institute of Medicine has recognized that the need for in-home providers "is beginning to reach a crisis stage."[22] The source of the crisis lies in both an increased demand for homecare services and a static or decreasing supply of workers.

1. With respect to demand, elderly individuals and persons with disabilities are living longer than ever before and increasingly electing to receive care in their homes. As the baby boom generation ages, this demand will grow.[23] Indeed, the Department of Labor projects a need for 71% more personal care aides and 69% more home health aides between 2010

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[22] Comm. on the Future Health Care Workforce for Older Ams., Inst. of Med. of the Nat'l Acads., *Retooling for an Aging America: Building the Health Care Workforce* 199 (2008) [hereinafter Inst. of Med.], *available at* http://tinyurl.com/PHI-InstofMed.

[23] Comm'n on Long-Term Care, U.S. Senate, *Report to the Congress* 5 (Sept. 30, 2013), *available at* http://tinyurl.com/PHI-CLTC.

and 2020. In no other area is the demand for new workers growing faster.[24] To meet this demand, an additional 1.3 million in-home providers must be added to the existing workforce of nearly two million providers.[25]

2. In the face of this growing need, the traditional labor pool for these jobs is stagnant. States have historically drawn in-home workers from a labor pool of women aged 25-54.[26] In fact, women make up nearly 90% of direct care workers.[27] Yet nationally this labor pool is projected to increase by just 1% over the next decade.[28] Thus, the expected

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[24] *Fastest Growing Occupations*, Bureau of Labor Statistics, U.S. Dep't of Labor (Feb. 1, 2012) [hereinafter Bureau of Labor Statistics], http://www.bls.gov/emp/ep_table_103.htm.

[25] *Id.* Many are also calling for personal care aides, specifically, to play a greater role in coordinating with medical professionals who care for beneficiaries. *See, e.g.*, Janet M. Coffman & Susan A. Chapman, *Envisioning Enhanced Roles for In-Home Supportive Service Workers in Care Coordination for Consumers with Chronic Conditions: A Concept Paper* 4 (2012), *available at* http://tinyurl.com/PHI-Coffman; Susan C. Reinhard, *A Case for Nurse Delegation Explores a New Frontier in Consumer-Directed Patient Care*, Generations, Winter 2010-11, at 75. The result is that states will not only need a far larger pool of homecare workers to fulfill these new roles, but also a workforce with the capacity and stability for related skills training.

[26] *See* PHI, *Facts 1: Occupational Projections for Direct-Care Workers 2010-2020* 4 (Feb. 2013), *available at* http://tinyurl.com/PHI-Facts1.

[27] *See* PHI, *Facts 3: America's Direct-Care Workforce* 7 (Nov. 2013), *available at* http://tinyurl.com/PHI-Facts3.

[28] PHI, *Facts 1*, *supra*, at 4.

demand for new homecare workers (1.3 million)[29] vastly exceeds the number of women in this age group projected to enter the labor force (612,350).[30]

State level data confirm these problems. In 2007, PHI conducted a survey of state Medicaid agencies and aging agencies: 97% of states reported "serious" or "very serious" shortages in their direct-care workforce.[31] Similarly, in 2012 the National Association of States United for Aging and Disabilities found that 84% of states reported serious concern about the lack of sufficient direct-care workers to meet beneficiaries' demand—nearly double the concern expressed in prior years.[32] Furthermore, individual states consistently report shortages within their homecare workforce.[33]

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[29] Bureau of Labor Statistics, *supra*.

[30] PHI, *Facts 1*, *supra*, at 4.

[31] PHI & Direct Care Workers Ass'n of N.C., *The 2007 National Survey of State Initiatives on the Direct-Care Workforce: Key Findings* 2 (2009), *available at* http://tinyurl.com/PHI-2007Survey.

[32] Nat'l Ass'n of States United for Aging and Disabilities, *2012 State of Aging and Disabilities Survey* 12 (2012), *available at* http://tinyurl.com/PHI-NASUAD.

[33] *See, e.g.*, Julie Robison et al., Univ. of Conn. Health Ctr., *Connecticut Long-Term Care Needs Assessment: Executive Summary* 15 (2010), *available at* http://tinyurl.com/PHI-Conn; Iowa Dep't of Pub. Health, *The Future of Iowa's Health and Long-Term Care Workforce* 11-12 (2007), *available at* http://tinyurl.com/PHI-Iowa; Gail MacInnes & Dorie Seavey, PHI, *Home Care at a Crossroads: Minnesota's Impending Long-Term Care Gap* 9 (2012), *available at* http://tinyurl.com/PHI-MacInnes.

B. Persistent Turnover Imposes Considerable Costs On States And Program Beneficiaries.

Turnover problems plague the homecare workforce, inhibiting the states' ability to secure a sufficient reserve of workers to serve all beneficiaries. Numerous studies confirm that turnover for personal care aides ranges "from 44 to 65 percent per year"[34]; put in slightly different terms, half of all providers leave their jobs each year. Left unremedied, such high rates of provider turnover result in significant costs for both the state providing care and the individuals receiving it.

Turnover is a "critical cost driver for the long-term care industry."[35] Existing empirical literature finds that turnover of *each individual worker*

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[34] Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,543 (Oct. 1, 2013) (to be codified at 29 C.F.R. pt. 552) (citing Dorie Seavey & Abby Marquand, PHI, *Caring in America: A Comprehensive Analysis of the Nation's Fastest Growing Jobs: Home Health and Personal Care Aides* 70 (2011)); *see also, e.g.*, Amy Hewitt & Sheryl Larson, *The Direct Support Workforce in Community Supports to Individuals with Developmental Disabilities: Issues, Implications, and Promising Practices*, 13 Mental Retardation & Developmental Disabilities Res. Revs. 178, 180 (2007) (reporting 52% turnover for persons caring for those with intellectual and developmental disabilities); Lisa Morris, *Quits and Job Changes Among Home Care Workers in Maine: The Role of Wages, Hours, and Benefits*, 49 Gerontologist 635, 644 (2009) (reporting 46% turnover of agency-employed home care workers in Maine).

[35] Dorie Seavey, *The Cost of Frontline Turnover in Long-Term Care* 4 (2004), *available at* http://tinyurl.com/PHI-Seavey2.

increases the direct cost of providing services by $2500.[36] Thus, the costs from turnover results in "an implicit tax on the reimbursement rates paid to publicly-financed providers—a hidden tax which ultimately is paid by tax payers for high industry turnover costs."[37]

When providers leave their jobs, beneficiaries "experience an interruption of services and the burden of getting used to and training [a] new employee."[38] And beneficiaries "may have to accept a period of potential low quality or unsatisfactory care while the new employee gains experience."[39] Many will be forced to forgo care altogether. In Arizona, for example, beneficiaries experienced "grave consequences" from service gaps "such as complete immobility, hunger, thirst, muscle aches, and other physical and mental distresses." *Ball v. Rodgers*, 492 F.3d 1094, 1101 (9th Cir. 2007) (internal quotation marks omitted). Ultimately, these gaps can force beneficiaries to visit an emergency room or seek other stopgap care, with states bearing the costs.

C. Working Conditions Are A Major Driver Of The Labor Problems States Face.

States confront a labor market that is poorly structured to provide a stable cadre of personal

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[36] *Id.* at 11.

[37] *Id.* at 20.

[38] Lori Simon-Rusinowitz et al., *Expanding the Consumer-Directed Workforce by Attracting and Retaining Unaffiliated Workers*, 11 Care Mgmt. Js. 74, 75 (2010).

[39] *Id.*

assistants available to meet the states' programmatic needs. The recruitment and retention difficulties arise largely from the "relatively low status, poor pay, and difficult working conditions" of these workers.[40]

1. Low pay and limited benefits frustrate recruitment and drive turnover. Studies consistently cite this factor when discussing the "deficit of direct-care workers."[41] In 2012, the national median hourly wage for personal care aides was $9.57.[42] In two-thirds of states, fulltime providers at the average hourly wage earn below 200% of the federal poverty level for individuals in one person households.[43] Those with children or other dependents are likely to be near the poverty level. Furthermore, approximately one third of aides lack health insurance, with uninsurance rates outside of agencies running as high as 45%.[44] It is therefore no surprise that over half of homecare aides and personal

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[40] A.E. Benjamin et al., *Retention of Paid Related Caregivers: Who Stays and Who Leaves Home Care Careers?*, 48 Gerontologist 104, 105 (2008).

[41] Inst. of Med., *supra*, at 200.

[42] *Economic News Release*, Bureau of Labor Statistics, U.S. Dep't of Labor (Mar. 29, 2013), http://www.bls.gov/news.release/ocwage.t01.htm (see entry for "Personal Care Aides").

[43] *See* PHI, *State Chart Book on Wages for Personal Care Aides, 2002-2012* 6 (Dec. 2013), *available at* http://tinyurl.com/PHI-ChartBook (listing each state's mean wage as compared to the federal poverty level).

[44] PHI, Facts 4: Health Care Coverage for Direct-Care Workers (March 2011), *available at* http://tinyurl.com/PHI-Facts4.

assistants live in households that receive some form of government assistance, such as cash welfare, medical assistance, or food stamps.[45]

2. The problems that cause recruitment and retention difficulties go far beyond poor compensation.

First, the work is often only part time. In 2011, 59% of aides reported working part time for at least some of the year.[46] PHI recently found that 40% of aides who worked part time reported that they would prefer more hours, but were unable to find additional work.[47] For many personal assistants, any guarantee of "stable hours last only until their current client dies or is hospitalized."[48] Workers have a limited ability to locate beneficiaries in need of additional support. In many states, decentralized, consumer-directed arrangements lack organized mechanisms for matching consumers in need with available workers.[49]

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[45] *See* Dorie Seavey & Abby Marquand, PHI, *Caring in America: A Comprehensive Analysis of the Nation's Fastest Growing Jobs: Home Health and Personal Care Aides* 67 (2011) [hereinafter PHI, *Caring in America*], *available at* http://tinyurl.com/PHI-Caring.

[46] *See* PHI, *Facts 3*, *supra*, at 4.

[47] PHI, *Caring in America*, *supra*, at 62.

[48] *Id.* at 60.

[49] *Id.* at 28; *see also* Dorie Seavey & Abby Marquand, *Building Infrastructure to Support CLASS: The Potential of Matching Service Registries* 3 (The SCAN Found., CLASS Technical Assistance Brief Series No. 16, 2011), *available at* http://tinyurl.com/PHI-SCAN.

Second, shifts themselves may often be short, unpredictable, and not worth the cost to the worker. A provider may work only a few hours per day or be required to work a split shift based on the beneficiary's needs.[50] Providers are seldom compensated for travel to and from beneficiaries' homes.[51] And beneficiaries' needs may be unpredictable,[52] limiting providers' abilities to plan their lives or the time they can commit to additional clients (if they can find them).

Third, workers face a significant risk of workplace injury. Patients' homes are "rarely designed as safe workplaces."[53] But personal assistants must often perform a series of demanding physical tasks, and they "often lack appropriate assistive devices for lifting, carrying, and supporting clients."[54] Working at dispersed worksites, homecare aides may fail to receive training to deal with the

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[50] Decl. of Frances Smith at ¶¶ 9, 11, *Oster v. Lightbourne*, No. 09-cv-04668-CW (N.D. Cal. Dec. 1, 2011), ECF No. 400; Corrected Decl. of Kerry Bargsten at ¶ 10, *Oster v. Lightbourne*, No. 09-cv-04668-CW (N.D. Cal. Dec. 5, 2011), ECF No. 421-1 [hereinafter Bargsten Decl.].

[51] PHI, *Caring in America*, *supra*, at 60.

[52] Bargsten Decl., *supra*, at ¶¶ 7-8.

[53] PHI, *Caring in America*, *supra*, at 48.

[54] *Id.*

unique needs of individual beneficiaries.[55] As a result, injuries occur often.[56]

For a variety of reasons, ranging from the lack of workers' compensation or other income support to a sense of responsibility for clients who will otherwise be left unattended, homecare workers often find themselves trying to work while injured. "Unaddressed injuries on the part of aides can worsen through continued overexertion and physical and emotional stress, ultimately worsening the

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[55] *Id.* at 49; *see also* Abby Marquand, PHI, *Personal Care Aide Training Requirements: Summary of State Findings* 4-5 (2013), *available at* http://tinyurl.com/PHI-Marquand.

[56] The structure of a decentralized workforce may actually mask the extent workplace injuries. Homecare worker injury rates "may be severely underestimated, largely because independent providers are generally ignored by current surveillance mechanisms." Inst. of Med., *supra*, at 212. The well-documented nursing home direct care staff injury rate is instructive. Nursing aides, orderlies, and attendants have "one of the highest rates of workplace injury among all occupations," and in 2006 the incidence of non-fatal occupational injury for these workers was "four times the average rate among all occupations," even higher than the rate for truck drivers and construction workers. *Id.* Reflecting the demanding nature of homecare work, personal assistants experience the *highest* rate of depression lasting two weeks or longer among *all* U.S. workers. PHI, *Caring in America*, *supra*, at 45. Whatever the injury rate, the data suggest that injury severity is likely higher with respect to homecare workers than with respect to nursing home and hospital workers. When it comes to reported injuries, homecare workers miss more than double the number of days missed by their institutional counterparts, "suggesting that injuries among home-based workers may be more severe and disabling." *Id.* at 48.

quality of care delivered to clients."[57] Without adequate support, injured workers will leave the homecare field either because they can no longer perform the job or because they decide that a job that impairs their own health is not worth having.

Fourth, worker backup arrangements are more difficult in consumer-directed programs,[58] so workers face difficulties taking time off for illnesses, dependent care, or special events. While an individual in a conventional workplace may find a substitute among coworkers, for homecare workers missing work may mean leaving a beneficiary bedridden or unfed.

Fifth, late payments are a chronic problem.[59] Workers do not interact on a daily basis with the state that pays for their employment. It may

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[57] *Id.* at 45.

[58] *See* Dorie Seavey & Vera Salter, *Bridging the Gaps: State and Local Strategies for Ensuring Back-up Personal Care Services* (Oct. 2006), *available at* http://tinyurl.com/PHI-Bridging.

[59] *See, e.g.*, Press Release, Am. Fed'n of State, Cnty. & Mun. Emps., Home Care Workers Protests Late Pay (Feb. 1, 2005), *available at* http://tinyurl.com/PHI-AFSCME (reporting that in Iowa late payments were "routinely" a problem "for workers all across the state"); Eric Boehm, *Payroll Problems for Home-Care Workers Cost Taxpayers Millions*, Pocono Record (Nov. 16, 2013), http://tinyurl.com/PHI-Boehm (late-payment problems resulted in thousands not being paid for months, expensive disruptions in service, a need for system upgrades, and customers seeking more expensive care, costing taxpayers approximately $7 million).

therefore be difficult for them to resolve these disputes and seek full payment.

Finally, the absence of a clear path to more advanced positions means that workers are more likely to view their job as a temporary post rather than as part of a career.[60]

These problems will be especially pressing to the main demographic group from which homecare workers are drawn: low-income women.[61] These women often have families. "[F]emale direct-care workers are more likely to be single mothers than are female workers in general."[62] Moreover, "of those who are single parents, 35 percent to 40 percent are below the poverty line."[63]

It is important to understand that unless the state can solve these problems, workers will defect to other jobs that, even if they provide the same hourly wage, are less likely to suffer from these additional disadvantages. A worker at a fast-food restaurant may have predictable shifts and coworkers with whom she can switch shifts if she needs to. A worker at a conventional worksite can more easily contact a human resources department to resolve pay issues. And a worker in a low paying retail job may have

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[60] *See, e.g.*, Benjamin et al., *supra*, at 106; Ruth Matthias et al., Cal. Emp't Dev. Dep't, *Caregiving Training Initiative: Final Process and Outcome Evaluation Report* 101 (2003), *available at* http://tinyurl.com/PHI-Matthias.

[61] *See* PHI, *Facts 3*, *supra*, at 7.

[62] Inst. of Med., *supra*, at 204.

[63] *Id.*

opportunities to advance to a supervisory position. Thus, it is not surprising that at the recruitment stage, potential providers are led to consider "a number of immediate, less stressful job alternatives, such as those offered by the food and hospitality industries."[64] And at the retention stage, current workers are "[i]nevitably" tempted "to move out of home-based caregiving jobs to improve their basic economic security."[65]

D. The Consumer-Directed Homecare Model Introduces Labor Market Problems That Are Beyond The Power Of Individual Beneficiaries To Fix.

Consumer-directed models can increase the stability of individual beneficiary-provider relationships, when a good provider can be found. But they do little on their own to keep workers in the field writ large. Without the state playing an active workforce building role, the state cannot rely on individual beneficiaries' choices to produce a cohort of experienced providers available to serve additional clients eligible for state services.

Neither individual low-income Medicaid beneficiaries nor individual low-income homecare providers have the expertise, the resources, or the incentives to address imperfections in the labor market. Individual beneficiaries may use consumer-directed models as a way of compensating family

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[64] *Id.* at 209.

[65] Morris, *supra*, at 648.

members who provide them with care. That is what happened in petitioners' case. But those beneficiaries are unlikely to care whether petitioners will go on to provide care to other Medicaid participants as well.

By contrast, the state *does* have a strong interest in encouraging experienced homecare providers to remain in the workforce. Large numbers of beneficiaries must look outside their immediate circle for homecare providers, and the state is responsible for providing those workers. Indeed, many beneficiaries desire or need to "turn to unaffiliated directly hired workers,"[66] either because they prefer an arms-length relationship offering greater autonomy or because they have needs that cannot be met by family members.

State experiments with "Cash and Counseling" programs illustrate the problems when consumer direction is not coupled with active state development of an adequate workforce. In those programs, states set few employment standards, instead simply providing consumers with an allowance to pay wages to a private provider, permitting moneys not spent on wages to be used for other approved purposes such as assistive technology.[67] Yet one five-year study found that "[s]ubstantial portions" of potential beneficiaries could not actually participate in the program "often because they could not find anyone to hire."[68] States

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[66] Simon-Rusinowitz et al., *supra*, at 74.

[67] For a discussion of "Cash and Counseling" programs, see generally Robert Wood Johnson Found., *supra*.

[68] Randall Brown et al., Mathematica Policy Research, Inc., *Cash and Counseling: Improving the Lives of Medicaid*

simply cannot ignore labor shortages in the hope that the market will respond adequately.

III. States Deserve Latitude To Address Homecare Labor Market Issues By Offering Collective Bargaining To Their Homecare Workforce.

States must affirmatively build the workforce they need. They could choose to act unilaterally, but many states have concluded that the wiser course of action is more collaborative. Given states' long experience with managing a variety of workforces, many of them have concluded that they are more likely to adopt changes that produce a skilled, stable workforce when they turn to tried-and-true labor relations institutions. So it is no surprise that several states have offered an opportunity for collective bargaining to the homecare workers whose salaries they pay, regardless of where those workers perform those jobs.

A. States Have Good Reason To Believe That Offering Collective Bargaining To Workers Can Improve The Effectiveness of Their Homecare Programs.

Without fixing the problems that plague the current labor market, states cannot successfully operate the consumer-directed, home-based programs they have justifiably chosen. There are a variety of paths that states might pursue to improve working

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Beneficiaries Who Need Personal Care or Home- and Community-Based Services: Final Report 95 (2007), *available at* http://tinyurl.com/PHI-Brown.

conditions and thereby attract and retain workers. Collective bargaining is one path that enjoys wide empirical and theoretical support. If anything, the state has distinctive justifications for offering it here.

1. Unionization allows states to capture the benefits of a consumer-directed model while creating an efficient infrastructure.

The benefits of offering a consumer-directed model are straightforward: program beneficiaries exercise substantial control in deciding who provides their care and how it is provided. But as already explained, states must necessarily continue to exert significant control over job duties, wage and benefits packages, and worker qualifications—both in order to ensure that their programs provide high quality care and to keep costs in line.

At the same time, home-based, consumer-directed homecare produces a state-financed workforce that is scattered across literally thousands of workplaces. States obviously need some tool for determining what combination of employment terms will best achieve the states' constellation of goals, and for responding to problems that inevitably arise from carrying out a complex government program.

Many states have long allowed collective bargaining to serve these needs. Collective bargaining creates an infrastructure through which the state can efficiently negotiate the terms of workers' employment, determine what mix of benefits will best attract and retain them, and resolve disputes quickly and equitably.

2. Collective bargaining enables states to manage their workforce and resources more effectively.

Contrary to petitioners' suggestion, Petr. Br. 42-43, collective bargaining differs materially from other methods for soliciting information. Unlike polls, questionnaires, or casual conversations around a non-existent water cooler, collective bargaining does not rely on individual, dispersed, poorly resourced workers.[69] Rather, as states have experienced for years with other portions of their workforce, collective bargaining channels, concentrates, and communicates worker preferences and priorities so that states can manage their workforce in a way that leads to more creative and effective solutions to complicated questions of workforce administration.

a. Unions can assist in creating open and effective lines of communication between dispersed workers and management, both in the contract negotiation process and in day-to-day operations.[70] Regular, effective dialogue between the state and its workforce's selected representative is essential to designing benefit programs and dispute resolution

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[69] Each of these workers of course retains his right to petition the government. Nothing in collective bargaining would, for example, stop a home care aide from contacting his state legislator with his concerns about the way the state is running its program.

[70] *See, e.g.*, Richard B. Freeman & James L. Medoff, What Do Unions Do? 94-110 (1984) (arguing that one of the primary benefits of unions is the "'exit-voice' tradeoff," which provides "discontented workers with a voice alternative to quitting" and permits workers to communicate their preferences at a low cost in a way that increases management's legitimacy).

systems, determining workers' collective preferences, and reinforcing the legitimacy of state decisions.[71]

In the negotiation process, states need to understand, given their limited resources, which package of benefits will be most attractive to current and potential workers and how to design benefits packages most effectively. Unions are well situated and incentivized to provide the necessary information.

Surveys or focus groups are a poor substitute for unions because they do not permit workers to discuss each other's concerns, learn from each other's experiences, or access relevant expertise. A union, however, can engage its members to determine priorities within a shared agenda and draw on otherwise unavailable expertise. For example, would workers prefer training programs or transportation subsidies? How important are flexible hours relative to predictable schedules? Union services are especially valuable where the workforce is widely dispersed, does not interact with the employer regularly, and has no history of enjoying benefits from which the state can intuit preferences.

In Illinois, collective bargaining led to state-funded health benefits through a union administered, state-audited program, jointly administered training and orientation programs, development of a registry to assist beneficiaries locate bargaining unit

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[71] *See, e.g.*, Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Council Act*, 69 Mo. L. Rev. 607, 609-16 (2004).

members for work opportunities, and a grievance procedure.[72] Collective bargaining in other states has developed similar benefits, as well as others. For example, union contracts in some California counties provide for a "Job Development Fund that reimburses homecare workers for continuing education."[73] In short, unions can substantially help states better navigate the tradeoffs they face in determining which benefits to offer or policies to enact.

b. At the same time, unions are also well positioned, because of frequent input from their members, to help states in developing care standards. For instance, in Washington State, the union collaborated with the state to create and sponsor a nonprofit school that delivers training to more than 40,000 homecare aides across more than 100 sites annually in thirteen languages.[74] This training partnership not only builds a career pathway for homecare aides, but provides training in the areas that providers have identified as being the most

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[72] See Agreement between the State of Illinois and the Service Employees International Union, *available at* http://tinyurl.com/PHI-Agree.

[73] Nari Rhee & Carol Zabin, *The Social Benefits of Unionization in the Long-Term Care Sector, in Academics on Employee Free Choice* 83, 89 (John Logan ed. 2009).

[74] *Addressing LTSS Service Delivery and Workforce Issues: Hearing Before the Comm'n on Long-Term Care*, U.S. Senate 108-10 (Aug. 20, 2013) (testimony of Charissa Raynor, Exec. Dir., SEIU Healthcare Nw. Training P'ship & Health Benefits Trust), *available at* http://tinyurl.com/PHI-Hearing.

crucial given their work experience.[75] And unions, because they communicate regularly with their members, can provide their members with information and assistance about state standards and how to comply with them. States benefit from the increased compliance.[76]

c. Virtually every collective bargaining agreement includes a dispute resolution process because such processes are more cost-effective than litigation.[77] Given that state-run homecare programs rely on a widely dispersed, low-income population working in isolated settings, the existence of a low-cost means of enforcing rights is critical. Once a contract has been signed, unions are indispensable participants in that process.

Such processes are particularly important in resolving homecare payment disputes. Providers work inconsistent hours and often serve multiple beneficiaries to cobble together a full-time schedule. These factors can lead to delayed payment, a

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[75] *Id.* at 110.

[76] *See, e.g.*, Cynthia Estlund, Regoverning the Workplace: From Self-Regulation to Co-Regulation 241-43 (2010); David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It (forthcoming 2014) (finding the presence of a union results in more effective enforcement practices).

[77] *See* Harry T. Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge, in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting of the NAA* 16 (James L. Stern & Barbara D. Dennis eds., 1983) (discussing an ABA report regarding the advantages of labor arbitration processes).

particularly pressing problem for workers living paycheck to paycheck. These workers may lack the sophistication either to understand their legal rights or to vindicate those rights on their own. But having an experienced, well-resourced union representative can assist them in obtaining the wages they have earned and can increase the dispute resolution process's credibility. Moreover, the union is far more likely than isolated, individual workers to identify systemic problems and to negotiate effective solutions.[78]

3. Unions also provide a variety of services to their members that increase workforce retention.[79]

a. Unions foster opportunities for training and skill development.[80] For example, union mentorship programs can be especially important in settings where workers are dispersed. The building trades have long illustrated this point,[81] and unions

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[78] *Cf.* Douglas L. Leslie, *Labor Bargaining Units*, 70 Va. L. Rev. 353, 354-60 (1984) (noting that unions are more likely to negotiate "collective goods").

[79] *See* Richard B. Freeman, *The Effect of Unionism on Worker Attachment to Firms*, 1 J. Lab. Res. 29, 30 (1980).

[80] *See, e.g.*, Paul Osterman & Beth Shulman, Good Jobs America: Making Work Better For Everyone 90, 105-115 (2011) (finding that unions can provide opportunities for workers to upgrade their occupational skills and abilities and can help construct career pathways that enable workers to advance in the field).

[81] Thomas Kochan et al., *Who Can Fix the "Middle-Skills" Gap?*, Harv. Bus. Rev., Dec. 2012, at 83, 85-86.

representing homecare workers have developed similar programs.[82]

b. Unions can also contribute to a productive work environment by increasing worker morale.[83] By giving workers a feeling of control over their work lives, collective bargaining lends credibility to state decisions, and makes workers more likely to view the homecare provider field as supporting a career rather than just a job.[84]

A study on the impact of cooperative union-management relations involving an analogous workforce at Kaiser Permanente supports this intuition. That study found that higher levels of engagement and effectiveness between management and unionized workers were associated with lower workplace injuries, higher rates of hospital quality, lower absenteeism, and higher patient satisfaction.[85]

c. A collaborative relationship between the union and state can also produce more creative solutions to

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[82] *See, e.g.*, Rhee & Zabin, *supra*, at 88 (noting a Washington State mentorship program).

[83] *See* Freeman & Medoff, *supra*, at 162-80 (1984) (finding that most quantitative studies of productivity conclude that unionized establishments are more productive than otherwise comparable nonunion establishments).

[84] *Cf.* Dale Belman, *Unions, The Quality of Labor Relations, and Firm Performance*, *in* Unions and Economic Competitiveness 41, 71 (Lawrence Mishel & Paula B. Voos eds., 1992).

[85] *See generally* Thomas A. Kochan et al., Healing Together: The Labor-Management Partnership at Kaiser Permanente (2009).

homecare problems. For example, a California homecare union partnered with a network of federally qualified health centers in a program where providers became part of the beneficiary's medical team to better coordinate treatment, identify gaps in care, and follow physician diagnoses.[86] Over two-thirds of patients receiving care from providers enrolled in the pilot "reported an improvement in their health-related quality of life."[87]

d. Finally, unions can help in the matching process that undergirds consumer-directed care. Local unions often work with the state to create and operate referral and registry systems.[88] Without such systems, unsophisticated consumers may be unable to find providers who have the right skills and availability. Union-assisted referral and registry systems can assist workers in finding initial positions, relief and respite for vacations or illness, and successor employment.

4. To be sure, collective bargaining is often associated with increased compensation for unionized workers. For instance, a study based on nationwide survey data of low-income workers concluded that "unionization raised workers' wages by just over 16

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[86] St. John's Well Child & Family Ctr, *The Power of Partnership: Annual Report 2012* 12 (2012), *available at* http://tinyurl.com/PHI-StJohns.

[87] St. John's Well Child & Family Ctr., *Development Newsletter* (Feb. 2013), *available at* http://tinyurl.com/PHI-StJohns2.

[88] Seavey & Marquand, *Building Infrastructure*, *supra*, at 2.

percent—about $1.75 per hour—compared to those of non-union workers" and that union workers "were 25 percentage points more likely to have employer-provided health insurance."[89] But because "ensuring good quality care hinges on the ability of policymakers to address the adequacy of the wages and benefits typically paid to direct-care workers,"[90] the available evidence strongly suggests that the increased compensation achieved through collective bargaining serves the interests of states and program beneficiaries as well as providers.

In California, for example, "unions and home care consumers who recognized their mutual interest in a well-paid, stable workforce" have transformed home healthcare.[91] Once workers in San Francisco achieved significant wage increases through collective bargaining, annual retention of new workers increased from 39% to 74%.[92]

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[89] John Schmitt et al., Ctr. For Econ. & Policy Research, *Unions and Upward Mobility for Low-Wage Workers* 2 (2007).

[90] Dorie Seavey & Vera Salter, AARP Pub. Policy Inst., *Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants* vi (2008).

[91] Candace Howes, *Upgrading California's Home Care Workforce: The Impact of Political Action and Unionization, in The State of California Labor* 71, 72 (Univ. of Cal. Inst. for Labor & Emp't, 2004).

[92] Candace Howes, *Living Wages and Retention of Homecare Workers in San Francisco*, 44 Indus. Rel. 139, 139 (2005).

Giving health insurance to providers in California also increased the probability that a worker remained in his job for at least one year by 21%.[93] In fact, the study concluded that one of the most important factors in attracting and retaining workers in California was providing health insurance.[94] Prior to unionization, no counties in California offered health insurance to in-home providers through their job. But as of 2008, 45 of 58 counties offered health insurance, 31 offered dental coverage, and 20 offered vision coverage.[95] Other California counties now provide transportation subsidies and sick and vacation leave.[96]

The experience in Washington State is similar. Unionized providers in Washington negotiated contracts that not only increased wages, but also created "a wage scale based on cumulative career experience."[97] These contracts also added health benefits (ultimately including vision and dental insurance) as well as workers' compensation insurance.[98] Such contracts are bound to increase retention rates: prior to their adoption, roughly one-third of Washington State providers responded that

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[93] *Id.* at 141.

[94] Candace Howes, *Love, Money, or Flexibility: What Motivates People to Work in Consumer-Directed Home Care?*, 48 Gerontologist 46, 58 (2008).

[95] Rhee & Zabin, *supra*, at 88.

[96] Seavey & Salter, *supra*, at 18.

[97] *Id.* at 19.

[98] *Id.*

they were more likely to stay in the in-home health care field if they received health insurance.[99]

5. While it may seem counterintuitive at first, raising homecare workers' compensation as part of a package of changes to working conditions may actually reduce a state's overall costs. Underpaying homecare workers is false economy. On the one hand, underpaying workers may ultimately increase costs through unnecessary hospitalization, institutionalization, and replacement costs for beneficiaries who lose their provider. On the other hand, creating packages that improve compensation and other working conditions may generate greater program efficiencies, by leading workers to stay in the job over a career.

Poor pay and benefits may especially force states to incur additional costs when they deal with a workforce composed disproportionately of women with children. Such conditions may force workers to seek such government assistance as food stamps, Medicaid, housing vouchers, or free school lunches. Indeed, in Wisconsin, the fiscal cost of providing such benefits to homecare providers alone is "tantamount to a public subsidy of $1 to $2 for every hour worked by a Wisconsin direct-care worker."[100] Thus, poor conditions simply divert government spending from

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[99] Dave Pavelchek & Candiya Mann, Wash. State Univ., *Evaluation of Interventions to Improve Recruitment and Retention: Summary of Results for the Washington State Home Care Quality Authority* 9-10 (2007).

[100] PHI, *State Facts: Wisconsin's Direct-Care Workforce* 5 (2011), *available at* http://tinyurl.com/PHI-WI.

one line item to another. Unlike private employers, then, states cannot externalize these costs. Rather, states eventually internalize all the negative consequences of labor instability among homecare workers.

States thus have good reason to conclude that offering collective bargaining is a cost-effective mechanism to create a skilled and stable workforce that will more effectively implement state programs caring for their most vulnerable citizens.

B. This Court Has Recognized That States Must Have Latitude To Determine How Best To Manage The Workforces That Carry Out State Functions.

The Illinois Medicaid programs at issue in this case are undoubtedly state operations. This Court has "long held the view that there is a crucial difference, with respect to constitutional analysis," between the government acting as a regulator of private activity "and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (alteration in original) (citation omitted). It is "well-established" that the Government is "granted the widest latitude in the 'dispatch of its own internal affairs.'" *Sampson v. Murray*, 415 U.S. 61, 83 (1974) (citation omitted). Thus, in striking the balance between an individual's First Amendment claims and the government's interests, the Court has "'consistently given greater deference'" to the government in this context. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 676 (1996) (citation omitted);

see also Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

The government, like private employers, needs the ability to manage its relationship to the individuals who carry out its business since, "without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Achieving efficiency "'is elevated from a relatively subordinate interest" when the government regulates the public "to a significant one when it acts as employer.'" *Engquist*, 553 U.S. at 598 (citation omitted). Moreover, this Court has emphasized that the greater latitude states enjoy in supervising state programs depends on the "nature" of the work being performed and not on the "formal status" of the individuals performing it. *NASA v. Nelson*, 131 S. Ct. 746, 759 (2011). Thus, this Court held, in the context of background checks for government contractors, that even if questions asked of a government contractor's employees "implicate[d] a privacy interest of constitutional significance," the questions were "reasonable" in light of government interests "in managing its internal operations." *Id.* at 751, 756.

This Court has therefore accorded states deference when they decide that offering collective bargaining to a state workforce contributes to the efficient provision of government services. This Court has consistently rejected First Amendment challenges either to states' decisions to offer collective bargaining or to requirements—like the one at issue here—that public sector employees "who do not wish to join a union" pay it "a service fee as a condition of their continued employment." *Locke v. Karass*, 555

U.S. 207, 213 (2009). Nothing in this Court's decisions suggests that states must sacrifice that prerogative when they deploy their workforce in the way best calculated to achieve the states' programmatic goals.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

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v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* PUBLIC SAFETY EMPLOYEES IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR *AMICI CURIAE* PUBLIC SAFETY EMPLOYEES IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI*[1]

Amici represent the men and women who serve as police officers, fire fighters, correctional officers, and supporting public safety employees serving communities across the nation. In their capacity as the collective bargaining representatives for these public safety employees, several a*mici* have successfully sought and

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

obtained through the collective bargaining process necessary work-related rights and safeguards for their members that allow them to better serve and protect their communities. *Amici*'s efforts not only improve working conditions for their members, but also undoubtedly benefit the communities they serve by, *e.g.*, ensuring adequate staffing levels and sufficient training. This benefits the public at large with faster response times and public servants ready to respond to emergencies both small and catastrophic.

Accordingly, the organizations representing these public safety employees urge this Court to preserve the existing exclusive representation and agency fee structure for public employees developed under *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977).

The Fraternal Order of Police ("FOP") is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities.

The International Association of Fire Fighters ("IAFF") is an organization representing more than 300,000 professional fire fighters, paramedics, and other emergency responders in the United States and Canada. More than 3,200 IAFF affiliates protect the lives and property of over 85 percent of the continent's population in nearly 6,000 communities in every state in the United States and in Canada. The IAFF's mission includes improving the working conditions of fire fighters and emergency medical services employees, as well as advancing the general health and well-being of those personnel through collective bargaining, labor agreements and other appropriate means. The IAFF seeks to promote the welfare of fire fighters and other emergency responders with respect

to health and safety, training, protective gear and equipment, and other terms and conditions of employment.

The National Association of Government Employees represents public sector workers in 43 different states from Hawaii to Illinois to Florida, including members in the International Brotherhood of Police Officers ("IBPO") and International Brotherhood of Correctional Officers ("IBCO"). IBPO is one of the largest police unions in the country, representing a significant number of members across the nation. IBCO represents a significant number of members throughout the state of Massachusetts and along the east coast.

The National Association of Police Organizations ("NAPO") is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers. Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States. NAPO represents more than 1,000 police unions and associations, 241,000 sworn law enforcement officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement. Substantially all of NAPO's member associations are state or local unions and duly authorized collective bargaining agents which bargain on behalf of and represent publicly-employed law enforcement officers.

The National Troopers Coalition, Inc. founded in 1977, is a not-for-profit organization that consists of 42 member associations in 38 states representing over 40,000 state troopers nationwide. The NTC is the only national organization that solely represents the interests of State Trooper and Highway Patrol Associations.

The California Correctional Peace Officers' Association ("CCPOA") is a nonprofit corporation and the union representing approximately 30,000 correctional officers and supervisors ("correctional officers") working in California state prisons. CCPOA represents its members with respect to their terms and conditions of employment. CCPOA has a strong interest in this case to assert and protect the individual rights of its members.

CDF Firefighters is a nonprofit association representing approximately 5,000 to 7,000 state firefighters employed by CAL FIRE, depending on the season. CDF Firefighters' members provide comprehensive fire protection and other related emergency services, including protection of life and property. CDF Firefighters represents its members with respect to their terms and conditions of employment.

Engineers & Architects Association ("EAA") is the recognized representative for approximately 5000 employees working for the City of Los Angeles in numerous bargaining units. Some of its members are in public safety positions, including crime and intelligence analysts, medical assistants and laboratory technicians, police clerks and related representatives, polygraph examiners, as well as other technical investigators. EAA represents its members with respect to their terms and conditions of employment.

International Association of Firefighters Local No. # 1775 (Marin County) is a Local representing approximately 400 fire suppression employees employed by the County of Marin and other municipalities and fire districts within the County of Marin. It represents its members with respect to their terms and conditions of employment.

The Corrections Officers and Forensic Security Assistants of the Michigan Corrections Organization ("MCO") performs a critical service for the state of Michigan: they are directly responsible for the safety of: (1) the public, (2) the prisoners / patients, and (3) all staff in Michigan's prison facilities and hospitals for the criminally insane. Consisting primarily of Corrections Officers, these employees undertake some of the most dangerous job duties, receive a high level of training to perform those duties, and work in an environment where threats to safety are a constant. The MCO represents 7,000 correctional officers and forensic security assistants, and has done so for over 3 decades. MCO believes that the job that is performed by its members is the most dangerous public service job in the state of Michigan.

The San Jose Police Officers' Association ("SJPOA") is a California nonprofit unincorporated labor association representing over 1000 individuals working in police officer classifications employed by the City of San Jose. SJPOA's purposes include advocating for the interests of its members and representing them as to their terms and conditions of employment.

The Santa Clara County Deputy Sheriffs' Association ("DSA") is the exclusive employee representative of approximately 425 individuals working as deputy sheriffs, sergeants, and lieutenants for the County of Santa Clara. The DSA represents these employees on all matters relating to the terms and conditions of their employment.

SUMMARY OF ARGUMENT

The public safety *Amici* agree with Respondents that there is no reason to revisit *Abood* and its

progeny. Under the agency fee system *Abood* established, union members are not forced to subsidize the collective bargaining costs for nonmembers who receive the benefits of a labor contract, and nonmembers are not forced to pay for any union political speech. *Abood*'s distinction between chargeable and nonchargeable expenses provides an adequate safeguard against any intrusion on nonmembers' First Amendment rights, while avoiding the free rider problem that would ensue if nonmembers (who receive all the benefits of a collective bargaining agreement) did not have to pay for any of the union's costs. If Petitioners were correct, moreover, then public employees' First Amendment rights would be harmed not only by mandatory agency fees but also by other compelled, employment-related economic associations with incidental First Amendment impact, such as the common requirement that public employees contribute to mandatory retirement pensions. That is especially true when employees' contributions are given over to corporations (*e.g.*, private pension managers or the invested-in companies) that engage in lobbying and political advocacy. Unlike agency fees, in the pension context public employees have no right to opt out of the use of their funds for political expenditures.

Agency fee agreements are not "forced" on public employees, notwithstanding Petitioners' contentions, because the states merely authorize—*rather than mandate*—such agreements. Indeed, not all states allow collective bargaining, and *Abood* does not require exclusive representation or agency fees for those that do. Instead, this Court has wisely allowed those states that allow public sector bargaining to develop their own rules regarding exclusive representation and agency fee requirements within *Abood*'s

broad outlines. Typically, these states have enacted statutes allowing public employers *and* their employees to freely negotiate and enter into agency fee agreements. This Court should thus reject a rule imposing a single solution for a matter implicating state sovereignty interests, *i.e.*, the conditions under which a state decides to negotiate its labor contracts with its employees.

Abolishing the existing exclusive representation and agency fee system in place in those states allowing such agreements would have devastating consequences for the entire machinery of state-law based collective bargaining and the labor contracts that are their product. States and localities have built labor relations systems and bargaining relationships, including in public safety bargaining units across the country, in reliance upon the rules established by *Abood*. That collective bargaining process—and the labor peace that it engenders—has been used, *e.g.*, to justify withholding the right of public safety employees to strike. States and local governments rely on the exclusive representation system because allowing multiple bargaining agents could lead to inefficient, unstable and disorderly personnel relations, including differences in salaries or employment arrangements—fostering claims of favoritism damaging to employee morale. Abolishing exclusive representation would unwittingly impose burdensome administrative difficulties on government agencies, including public safety agencies, because they would have to expend their already limited time and resources to negotiate and enter into contracts with more than one collective bargaining agent.

ARGUMENT: THIS COURT SHOULD NOT OVERRULE *ABOOD* BECAUSE STATE LAW COLLECTIVE BARGAINING MACHINERY—INCLUDING PUBLIC SAFETY EMPLOYEES' NEGOTIATED CONTRACTS—ARE BUILT ON ITS AGENCY FEE STRUCTURE

For almost 40 years, this Court has repeatedly reaffirmed and expanded on the principles articulated in *Abood* when deciding the constitutional reach of collective bargaining in the public sector. Based on those precedents, half the states have laws authorizing *employees* to choose—but not mandating—exclusive representation and agency fee agreements. Public employers and employees, in turn, have used exclusive representation to negotiate and agree to countless labor contracts, many of which contain agency fee agreements. This includes public safety employees who dutifully serve and protect the people in their local communities.

Petitioners disregard this collective bargaining system and the justified reliance it has engendered, insisting that the First Amendment demands that *Abood* must be overruled outright. *Abood* rests on firm constitutional grounds, however, as Respondents have ably demonstrated. *See* Resp. Br., *generally*.

There is no reason to reconsider decades of precedent that has guided this Court, state legislatures, and labor contracting parties.

1. *Abood* is constitutionally sound, and Petitioners overreach by asking this Court to reconsider exclusive representation and agency fee agreements.

Despite Petitioners' attempts to paint agency fees as a pernicious affront to First Amendment liberties, the

truth is that such fees merely cover nonmembers' fair share of the costs of collective bargaining. Indeed, in California and elsewhere they are known as "fair share fees." *See, e.g.*, Cal. Gov. Code § 3515.7(a).

Abood itself held that fair share fees charged to nonmembers cannot include, "even temporarily," a union's expenses for political speech. 431 U.S. at 244 (Stevens, J., concurring). To further that end, in subsequent cases this Court has broadly outlined the procedural protections for nonmembers, the categories of collective bargaining costs that can be charged to them (*i.e.*, non-political and germane to collective bargaining), as well as those that cannot (*i.e.*, political, non-collective bargaining costs). *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (notice and procedural protections); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 466 U.S. 435, 456-457 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Locke v. Karass*, 129 S.Ct. 798 (2009) (scope of chargeable and nonchargeable expenses). Petitioners largely ignore the details of this body of law, and certainly do not persuasively demonstrate that system is unworkable or resulted in unwarranted First Amendment impingements.

Nonunion members—like Petitioners here—unquestionably benefit from union expenditures in negotiating and securing a labor contract with their public employers, as well as from expenditures in administering, implementing, and enforcing that contract. That is because unions in both the public and private sector owe a statutorily-imposed duty of fair representation to nonmembers in the same bargaining unit. *See Abood*, 431 U.S. at 221. These benefits are direct and immediate, determining both

the day-to-day working conditions employees encounter and the actual wages they earn. That alone distinguishes collective bargaining from the diffused, policy-based lobbying efforts that Petitioners unpersuasively try to analogize to collective bargaining. *See* Pet. Br. at 49.

Absent agency fees, nonmembers would become "free riders" obtaining collective bargaining benefits without paying their fair share of collective bargaining costs. *Abood*, 431 U.S. at 222. That would unwittingly compel the union, and its members, to subsidize such costs for nonmembers, effectively burdening the associational interests of those members. *See Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in judgment and dissenting in part) ("What is distinctive ... about the 'free riders' who are nonunion members of the union's own bargaining unit is that ... they are free riders whom the law requires the union to carry—indeed, requires the union to go out of its way to benefit, even at the expense of its other interests.... [T]he source of the state's power, despite the First Amendment, to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership"); Fisk, Catherine L. & Chemerinsky, Erwin, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1033 (July, 2013) (in non-agency fee states "employees who wish to form a union are effectively forced to subsidize the provision of the union benefits to coworkers who refuse to support the union").

Given this duty of fair representation, the interests served by the collective bargaining system—including the interests of unions and their members—are substantially weakened without a fair share fee

requirement. Even employees who support the union's goals will have strong incentives to become free riders. That is because their individual decision whether to pay dues towards the union's collective bargaining costs will have little effect, by itself, on the union's functioning; and even if they elect to pay but others do not, such that the union's ability to bargain on their behalf is substantially weakened, then they will enjoy little benefit from their contribution. As explained by noted economist Mancur Olson in relation to large groups organized to achieve public benefits:

> Though all of the members of the group ... have a common interest in obtaining this collective benefit, they have no common interest in paying the cost of providing that collective good. Each would prefer that the others pay the entire cost, and ordinarily would get any benefit provided whether he had borne part of the cost or not.

MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 21 (1971) (discussing collective action problems). To solve this collective action problem—*i.e.*, that the most economically rational choice for each individual is not to contribute toward the union, even if he or she supports its goals and will benefit from its efforts—Olson explained that it is necessary to mandate support for large groups that provide collective benefits. *See id.* at 11, 14-16, 67, 76, 85-86.

That workers understand and broadly accept this is clear. By and large, it is *the employees themselves* that agree to mandatory agency fees (*see* Part 2, *infra*), and to the majority selection processes (which they can reject through the decertification processes). Indeed, the history of fair share fees under the National Labor

Relations Act in the private sector vividly illustrates this point. For four years beginning in 1947, in order to authorize agency fees, federal law required that a majority of employees eligible to vote (not just a majority of those voting) cast ballots in favor of agency fees in a secret-ballot election. OLSON, *supra*, at 85. During that time, unions won 97 percent of the elections held (in almost 50,000 workplaces), and by overwhelming margins. *Id.*; Mayer, Erwin S., *Union Security and the Taft-Hartley Act*, 1961 DUKE L.J. 505, 517 (1961). As a result, in 1951, Congress amended federal law so that specific agency fee elections were no longer required. OLSON, *supra*, at 85. Congress' historical experiment with requiring employees in unionized workplaces to vote separately on whether to authorize agency fees shows that workers themselves see these arrangements as being in their collective self-interest and necessary to support a healthy system of collective bargaining.

Although Petitioners deride the free rider problem, it has real world consequences for labor unions and their members, including public safety employees. First, without agency fees a union is forced to spend money paid by members for their own benefit to fund collective bargaining costs for nonmembers. *Robinson v. New Jersey*, 741 F.2d 598, 610 (3d Cir. 1984). Indeed, forcing members to fund collective bargaining costs for nonmembers would (if collective bargaining is viewed as expressive activity) burden the First Amendment rights of the union and its members. Malin, Martin H., *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 868 (1989) ("The statutory duties of an exclusive bargaining representative ... can inhibit the union's and its members' exercise of their first amendment rights").

Second, although Petitioners insist that unions' collective bargaining activity "does not ... *legally* or *ethically* create an obligation for all [nonmembers] to subsidize" the union (*e.g.*, Pet. Br. in Resp. to *Amicus Curiae* Br. of U.S. at 7, emphases added), that is not quite right. States have enacted statutes authorizing adoption of mandatory agency fee arrangements because unions have *both* a legal and ethical duty of fair representation to nonmembers. Nonmembers greatly benefit from labor contracts. *See e.g.*, *Lehnert*, 500 U.S. at 553 (Scalia, J., concurring in judgment and dissenting in part) ("Mandatory dues allow the cost of ... the union's statutory duties—to be fairly distributed; they compensate the union for benefits which 'necessarily'—that is, by law—accrue to the nonmembers"); *see also* Fisk & Chemerinsky, 98 CORNELL L. REV. at 1032-1033 n.32 ("workers in right-to-work states tend to earn less than workers in other states"; collecting articles).

Further, Petitioners' argument misses the mark because whether to allow exclusive representation and agency fee agreements is fundamentally an issue of public policy best left to the states. *See* Part 2, *infra*. Simply stated, resolving—or not resolving[2]—the free rider problem is quintessentially an economic issue and a governmental personnel policy properly reserved to legislative bodies. States have a right to decide these matters according to the policy

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[2] For example, even in many so-called "right-to-work" states some or all public employers may choose an exclusive representation system—likely for its administrative convenience and labor peace benefits acknowledged in *Abood*—but unlike agency fee states they force their unions to shoulder the free rider cost alone. *See* Fisk & Chemerinsky, 98 CORNELL L. REV. at 1033; *see also* n.6, *infra*.

preferences of its citizens. This Court should reject a rule that imposes a single solution for a matter implicating core state sovereignty interests, *i.e.*, the conditions under which a state decides to negotiate its labor contracts with its employees.

Petitioners' argument, moreover, simply proves too much. Their argument would also prohibit mandatory public employee contributions to pension funds because such contributions are managed by or invested in corporations engaging in political speech. "[T]he state's use of mandatory employee contributions to purchase corporate securities raises ... compelled speech and association concerns...." Sachs, Benjamin I., *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUMB. L. REV. 800, 868 (May 2012). Agency fees and pension contributions share similar characteristics because both are funded by mandatory deductions from public employees' salaries in exchange for a statutorily-defined benefit.[3]

Almost all states make public employee contributions to pension funds a mandatory condition of

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[3] To be sure, this Court has distinguished the dissenting shareholder who wishes to dissociate from a corporation, from the dissenting bargaining unit member who wishes to dissociate from a union. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978) ("the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time"; "no shareholder has been 'compelled' to contribute anything"); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 709-710 (1990) (Kennedy, J., dissenting) (noting that "the disincentives to dissociate are not comparable"). That rationale does not apply in the mandatory pension contribution context, because of the compulsory nature of the contributions *and* because employees have no control over where their salaries are invested.

employment *without even allowing employees to opt out*—a right guaranteed under *Abood* for agency fees.

> Legislation in forty-four states establishes that public employee participation in the state's pension plan is "a condition of employment," "mandatory," or "compulsory." Of all state and local workers who participated in a public pension plan in 2010 ... seventy-nine percent were required by law to make financial contributions from their salaries to the plan. Because public pensions are defined benefit plans ... the contributing employees do not determine how their contributions are invested. Instead, the trustee of the plan—or some other fiduciary—makes these decisions. Not surprisingly, public pension funds invest heavily in corporate securities: In 2008, $1.15 trillion of the $3.19 trillion in assets held by public pensions—or thirty-six percent—was invested in corporate stock.

See id. at 867 (footnotes omitted); *see also* Bodie, M., *Labor Speech, Corporate Speech, and Political Speech: A Response to Professor Sachs*, 112 COLUM. L. REV. SIDEBAR 206, 208 (2012) (arguing against opt out because mandatory contributions are "part and parcel of operating in a modern economy").

Some public employers go even further and directly require their employees to participate in privately-managed retirement plans. *See, e.g.*, Alaska Stat. §§ 14.25.345, 39.35.740; R.I. Gen. Laws § 36-10.3-4(1); Va. Code Ann. § 51.1-169(C)(1); 29 Del. C. 1953 § 5543; K.S.A. § 74-4925(1)(b); Minn. Stat. § 354C.12(1)(a); N.J. Stat. § 18A:66-174(a). As a result, many public employees are required to pay fees directly to

government-selected private corporations managing their retirement plans, and those corporations are free to use these fees to finance a wide range of political and expressive activities. If a government employer may lawfully select a service provider for public pension services and then mandate its employees pay fees to that provider, there is no reason a government employer should not similarly be permitted to allow its employees themselves to select a collective bargaining services provider and to require those employees to pay the costs in a manner that ensures that such costs are fairly distributed across the benefited workforce.

In short, if a public employer can require its employees to contribute to pension funds (including privately-managed pension plans) without any assurances those contributions will not be used for political purposes, it should also be able to require agency fee agreements—which *Abood* and its progeny have ensured will *not* be used for political purposes.

2. Exclusive representation and fair share fees are not "forced" on public employees by the states because states merely authorize these options for employees, rather than mandate them. Public employees may choose to unionize, and, if so, public employers and employees may freely negotiate contracts with agency fee agreements.

Petitioners assert throughout their brief that states impose exclusive representation arrangements and agency fees on public employees. *See* Pet. Br. at 35 and *generally*. That is incorrect. Quite simply, not all states allow public sector collective bargaining, and *Abood* does not mandate exclusive bargaining or agency fees for those that do. *Abood* merely allowed

those states that made the policy choice to allow public sector bargaining to develop their own rules regarding exclusive representation and agency fee requirements within its broad outlines.

State collective bargaining statutes themselves *authorize* but do *not mandate* exclusive representation and agency fee agreements. "[N]either federal nor state law requires that anyone pay agency fees; no statute requires that nonmembers of a union pay funds to support the collective bargaining activity of a union. Agency fees are collected only if a majority of employees vote to unionize, and only then if the union and the employer agree to a contract requiring the payment of fees." *See* Fisk & Chemerinsky, 98 CORNELL L. REV. at 1084 (footnotes omitted). Exclusive representation is unquestionably a decision made by public employees themselves. Indeed, the Disabilities Program Petitioners in this case voted to reject exclusive representation under Illinois' statutes. *See* Pet. Br. at 11.

If public employees decide to unionize, states like California allow public employers and employees to freely negotiate inclusion of agency fee terms during labor contract negotiations. *See* Cal. Gov. Code §§ 3502.5 (local public employees), § 3515.7 (state employees). These statutes reflect the discretionary nature of agency fee agreements, *i.e.*, that the parties "may" bargain over them. *See, e.g.*, Cal. Gov. Code §§ 3502.5 ("an agency shop agreement *may* be negotiated between a public agency and a recognized public employee organization"), § 3515.7(a) ("Once an employee organization is recognized as the exclusive representative ... it *may* enter into an agreement with the state employer providing for ... [a] membership or fair share fee deduction") (emphasis added).

Public employers ultimately do not have to agree to any agency fee arrangement, even if it is requested by a union. *See id.* And even after such agreements are finalized, some of these statutes provide for rescission of agency fee agreements by employees, including nonmembers. *See* Cal. Gov. Code §§ 3515.7(d) ("A fair share fee provision in a memorandum of understanding ... may be rescinded by a majority vote of all the employees in the unit...."), § 3502.5 (similar).[4]

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[4] To be sure, at least one state allows some public employees to adopt fair share fees by majority vote of the entire bargaining unit—*i.e.*, union members *and* nonmembers—outside of a negotiated agreement. *See* Cal. Gov. Code § 3502.5(b)(1) (authorizing local government employees to adopt agency fees by majority vote). This provision has rarely been invoked, but when it has a majority of *all* employees themselves agreed to agency fee agreements in four of the five such elections held since the statute was enacted in 2000. *See* 2000-2013 Cal. Public Employees Relations Board Annual Reports, Appendix, III. Elections Conducted, "Organizational Security – Approval" and "Fair Share Fee – Reinstatement" found at http://www.perb.ca.gov/AnnualReports.aspx (last visited Dec. 24, 2013); *cf.* OLSON, *supra*, at 85. In any event, regardless of whether fair share fees are adopted through agreement with a public employer or a workplace election, they exist only when authorized by a state legislature, and even then by majority vote of the employees themselves.

As noted in the text, public employees can still vote to rescind such fees. Cal. Gov. Code § 3502.5(d) provides, in relevant part:

> (d) An agency shop provision ... *may be rescinded* by a majority vote of all the employees in the unit ... provided that: (1) a request for that type of vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit, (2) the vote is by secret ballot, and (3) the vote may be taken at any time during the term of the memorandum of understanding, but in no event shall there be more

Numerous other states have analogous statutory schemes allowing public employers and their employees to negotiate agency fee agreements.[5] Based

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> than one vote taken during that term.... The procedures in this subdivision are also applicable to an agency shop agreement placed in effect pursuant to subdivision (b).

(emphasis added); *see also* Cal. Gov. Code § 3515.7(d) (similar).

[5] Twenty-six states and the District of Columbia generally allow employers and employees to negotiate, and agree to agency fee agreements. See, e.g., Alaska Stat. §§ 23.40.110(b) and 42.40.760(b)(2); Cal. Gov. Code §§ 3502.5, 3515.7; Conn. Gen. Stat. § 5-280; 14 Del. C. 1953 § 1319; D.C. Code § 1-617.07; Ill. Comp. Stat. 5 § 315/6; Ky. Rev. Stat. § 337.060; Maine Rev. Stat. tit. 26 § 979-B; Md. Code, Health – General § 15-904; Mass. Gen. Laws 150E, § 2; Mich. Comp. Laws Ann. §423.210(3)-(4)(2013) (only for police officers, fire fighters, and state police troopers and sergeants); Minn. Stat. § 179A.06; Mo. Stat. §§ 105.510 and 105.520, *Schaffer v. Bd. of Educ. of City of St. Louis*, 869 S.W.2d 163 (Mo. Ct. App. 1993) (construing 105.520 to authorize fair share provisions); Mont. Code § 39-32-109; N.H. Rev. Stat. § 273-A:11, *Nashua Teachers Union v. Nashua Sch. Dist.*, 142 N.H. 683 (1998) (construing § 273-A.11 to authorize fair share provisions); N.J. Stat. § 34:13A-5.5; N.M. Stat. 1978 § 10-7E-9; N.Y. Civ. Serv. Law § 208(3)(a); Oh. Rev. Code § 4117.09; Ore. Rev. Stat. § 243.666; Penn. Stat. § 1102.3; Vt. Stat. § 1621(b); Wash. Rev. Code § 49.39.090; Wis. Stat. § 111.06; cf. *Nickolls v. City of Longmont*, 2013 WL 393331 (D. Colo. Jan. 30, 2013); *Town of North Kingstown v. North Kingstown Teachers Ass'n*, 110 R.I. 698 (1972). West Virginia does not appear to have affirmative authority on the matter, but it does not forbid agency fee agreements.

Twenty-four states have so-called "right to work" laws prohibiting such agreements. Pet. Br. at 36; e.g., *State, Cnty. & Mun. Emp. Local 2384 v. City of Phoenix*, 142 P.3d 234, 235 (Ariz. 2006) (fair share fees violate Arizona right-to-work law); *United Ass'n of Journeymen Local Union No. 141 v. NLRB*, 675 F.2d 1257, 1258-62 (D.C. Cir. 1982) (fair share fees violate right-to-work laws of Arkansas, Florida, Louisiana and Mississippi); *see*

on such collective bargaining statutory schemes, public employers and employees throughout the country have negotiated in good faith and entered into binding and often multi-year labor contracts that include agency fee agreements. *See* Part 3, *infra*.

There are sound reasons for an exclusive representation regime. In contrast to the fractured system that would result if a government employer were forced to contend with multiple unions representing the same collective bargaining unit, exclusive representation is straightforward. Even many "right-to-work" states still recognize the benefits of exclusive representation for some or all of their public employees, reinforcing *Abood*'s point that nonexclusive representation imposes burdensome administrative difficulties forcing employers to expend time and resources to negotiate and enter into contracts with more than one collective bargaining agent.[6]

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also National Right to Work Legal Defense Foundation, Inc., Right to Work States, http://www.nrtw.org/rtws.htm (last visited Dec. 24, 2013).

[6] *See, e.g.*, Ark. Code Ann. § 6-17-202 (authorizing exclusive representation system for school district employees); Fla. Stat. § 447.307(1)(a) (same, for all public employees); Ga. Code Ann. § 25-5-5 (firefighters); Idaho Code Ann. §§ 33-1273, 44-1803 (school districts and firefighters); Ind. Code §§ 11-10-5-5(a)(2), 12-24-3-5(a)(2), 16-33-4-23(a)(2), 20-21-4-4(a)(2), 20-22-4-4(a)(2), 20-26-5-32.2(a)(2), 20-28-9-11, 20-28-9-19, 20-29-5-2, 36-8-22-9 (various public safety and school employees); Iowa Code § 20.16 (public employees); Kan. Stat. Ann. §§ 75-4327, 72-5415 (public employees); Mich. Comp. Laws Ann. §§ 423.26, 423.211, 423.234, 423.274 (public employees); Neb. Rev. Stat. §§ 48-816(4), 81-1373(2) (public employees including supervisors); Nev. Rev. Stat. § 288.027 (local government employees); Okla. Stat. Ann. tit. 11 § 51-103, tit. 19 § 901.30-2, tit. 70 § 509.2 (school employees,

Further, subjecting a state's decision to allow exclusive representation to strict scrutiny, as Petitioners advance (*e.g.*, Pet. Br. in Resp. to *Amicus Curiae* Br. of U.S. at 5), is frankly unworkable—especially if it is implemented on the case-by-case basis they seemingly advocate. It would place government in the position of intruding and second-guessing its employees' desire to speak with one voice every time a collective voted for exclusive representation.

The existing regime under *Abood* is the preferable one. It allows the states to continue to authorize—rather than mandate—collective bargaining and exclusive representation pursuant to the policy preferences of its citizens. And it also allows public employees to decide whether to bind themselves to such agreements, in accordance with their own preferences. *Cf.*, *e.g.*, Pet. Br. at 10-11 (acknowledging that homecare providers voted for unionization and that disability care providers rejected it).

More broadly, exclusive representation is of particular importance in public safety bargaining

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municipal fire fighters and police officers); S.D. Codified Laws §§ 3-18-3, 60-9A-3 (public employees); Tex. Local Gov't Code §§ 142.058, 142.108, 142.155, 149.009 (municipal police officers, fire fighters, emergency medical services personnel, municipal employees), Tex. Transp. Code § 451.754 (metropolitan rapid transit authority); Utah Code Ann. §§ 34-20-9(1)(a), 34-20a-4 (firefighters and other public employees); Wyo. Stat. § 27-10-103 (fire fighters).

Some "right-to-work" states even allow fair share fees for certain public employees. *See, e.g.*, Mich. Comp. Laws Ann. § 423.210(3)-(4) (2013) (police and fire, state police troopers and sergeants); *Cone v. Nev. SEIU/SEIU Local 1107*, 998 P.2d 1178 (Nev. 2000) (Nevada law does not prohibit union from charging fees for individual representation).

units, where the paramount need for high discipline and morale militate against allowing multiple bargaining agents. That is because allowing multiple bargaining agents in this context will mean that public safety employees working in the same jobs and in the same unit may be paid different salaries and benefits for the same work, and they may believe such differences are the product of unwarranted favoritism or not otherwise based on legitimate grounds. That arrangement would undoubtedly damage morale among police officers, firefighters, and indeed any group of public employees who provide important services to the public. It would also, of course, needlessly but substantially complicate and increase the costs associated with the design and administration of personnel and benefit systems. There can be no doubt that avoiding such consequences is a legitimate legislative goal reserved to the states.

3. The reliance interests of public employers and their employees—particularly in the public safety context—counsel against overruling *Abood*.

The states and local governments have enacted comprehensive collective bargaining schemes authorizing exclusive representation and agency fees based on *Abood*. Public employers and employees have negotiated and entered into binding, multi-year contracts based on those statutes and *Abood*. These reliance interests caution against overturning *Abood*. "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision" *Hilton v. S. Carolina Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991). The demands of the doctrine of *stare*

decisis "are at their acme ... where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

When legislative and private reliance interests are at stake, this Court has repeatedly adhered to *stare decisis* because wantonly overruling established precedent "would dislodge settled rights and expectations or require an extended legislative response." *Hilton*, 502 U.S. at 202. Indeed, "*stare decisis* protects the legitimate expectations of those who live under the law, and ... is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained. Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)." *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) (quoting THE FEDERALIST NO. 78, p. 471 (C. Rossiter ed. 1961).)

As summarized in *Randall v. Sorrell*, 548 U.S. 230, 243-244 (2006):

> The Court has often recognized the "fundamental importance" of *stare decisis*, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. *See Harris v. United States*, 536 U.S. 545, 556–557 (2002) (plurality opinion) (citing numerous cases). The Court has pointed out that stare decisis " 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (quoting

> *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.

For almost 40 years, this Court has repeatedly adhered to *Abood* in considering the constitutionality of exclusive representation and agency fees, and related agreements. *See Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983) (exclusive representative may have exclusive access to interschool mail system under *Abood*); *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 291 (1984) (nonmembers may be excluded from policy meetings on questions relating to employment but outside scope of mandatory bargaining); *Ellis*, 466 U.S. at 457, *Lehnert*, 500 U.S. 507, and *Locke*, 129 S.Ct. 798 (deciding scope of chargeable and non-chargeable expenses); *Hudson*, 475 U.S. 292 (notice and procedural protections to fair share members under *Abood*); *Davenport v. Washington Education Ass'n*, 127 S.Ct. 2372 (2007) (states may implement *Abood* using opt-in procedure for agency fees); *see also Communications Workers of America v. Beck*, 487 U.S. 735 (1988) (*Abood*'s exclusive representation and agency fee regime applies to private sector employees under NLRA); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1988) (applying *Abood* to agency fee dispute in private sector). In short, this Court does not "write on

a clean slate" and "overrul[ing] the long and unbroken series of precedents reaffirming ... principle[s]" developed under *Abood* would require that "a number of other major decisions also would have to be reconsidered." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494-495 (1987).[7]

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[7] Outside the agency fee context, *Abood* is central to this Court's "compelled speech" and "compelled association" jurisprudence in a number of important areas, such as: compulsory assessments for advertising (*e.g., Johanns v. Livestock Marketing Ass'n*, 125 S.Ct. 2055 (2005); *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997)); compulsory assessments for student fees in public universities (*Bd. of Regents of Univ. of Wisconsin System v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. University of Virginia*, 515 U.S. 819, 839 (1995)); compelled assessments by state bar organizations (*Keller v. State Bar of California*, 496 U.S. 1 (1990)).

More broadly, this Court has drawn on the principles in *Abood* in a number of other areas with potential First Amendment concerns, including: dissenting shareholder rights (*Bellotti*, 435 U.S. at 794 n.34; *McConnell v. FEC*, 540 U.S. 93, 325 (2003) (Kennedy, J., concurring and dissenting); compelled subsidization of speech on private property (*Pruneyard v. Robins*, 447 U.S. 74, 99 n.2 (1980)); compulsory inserts for utility bills (*Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 543 n.13 (1980); *PG&E v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986)); compelled association concerns vis-à-vis private associations (*Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)); regulation of speech of publicly-funded abortion counselors (*Rust v. Sullivan*, 500 U.S. 173, 212-213 (1991) (Blackmun, J., dissent)); and prohibitions against retaliation in renewal of public contracts (*Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668 (1996)); *see also Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (protections available to political speech); *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781 (1988) (charitable fundraising disclosures); *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (right to petition government); *Brown v. Legal Foundation of Washington*,

Legislative reliance counsels in favor of adherence to precedent. *See, e.g., Randall*, 548 U.S. at 244 (where precedent has been used in drafting legislation and has continued to be used over time, it would dramatically undermine this reliance to overturn it); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 785 (1992) (adhering to tax precedent because "[s]tate legislatures have relied upon our precedents by enacting tax codes ... Were we to adopt New Jersey's theory, we would be required ... to invalidate those statutes .... New Jersey's proposal would disrupt settled expectations in an area of the law in which the demands of the national economy require stability").

Further, *stare decisis* is particularly favored where parties have entered into contractual agreements relying on existing precedent. *See, e.g., Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 272 (1995) (refusing to overrule case because "private parties have likely written contracts relying upon [prior precedent] as authority"); *Quill Corp. v. North Dakota By & Through Heitkamp*, 504 U.S., 298, 316 (1992) (refusing to overrule case because precedent "has engendered substantial reliance and has become part of the basic framework of a sizeable industry"); *Citizens United v. F.E.C.*, 558 U.S. 310, 365 (2010) ("reliance interests are important considerations in ... contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions"); *see also The Genesee Chief*, 53 U.S. 443, 458 (1851) ("one would suppose that after the decision of this court ... he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, *stare decisis* is

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538 U.S. 216, 253 (2003) (Kennedy, J., dissent) (use of interest on lawyer trust accounts to pay for indigent legal services).

the safe and established rule of judicial policy"); *cf. Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissent) ("reliance by law enforcement officers is also entitled to weight").

There is no question that the states have legislated and parties have negotiated and entered into contracts based on the validity of *Abood* and its progeny. As outlined above, the California Legislature expressly allows public employers at the state and local level to negotiate and enter into contracts allowing exclusive representation and agency fee agreements. *See* Part 2, *supra*. Countless other state legislatures and local governing agencies have similarly legislated and negotiated and ratified collective bargaining agreements with public employees. *Id.* These agreements include the labor contracts governing relations with public safety employees, such as police officers, correctional officers, and firefighters.[8]

The collective bargaining process—and the peaceful labor relations that it engenders—has been used, *e.g.*, to justify withholding the right of public employees to strike. *See* Hanslowe, K. & Acierno, J., *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1076-1077 and n.85 (1982) (prohibition on strikes by "policemen and firefighters" justified by "a system of compulsory binding arbitration" because "as a matter of public policy" these public employees are "denied the usual right to

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[8] Dictum in *Knox v. SEIU*, 132 S.Ct. 2277 (2012) questioning certain aspects of *Abood* does not defeat this longstanding reliance interest. As explained by Justice Scalia, "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance...." *Quill*, 504 U.S. at, 320 (Scalia, J., concurring) (internal quotation, citation and brackets omitted; emphasis original).

strike") (quoting *School Comm. v. Westerly Teachers Ass'n*, 111 R.I. 96, 105-10 (1973) (Roberts, C.J., dissenting)); Malin, M., *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 873 (1989) ("Most jurisdictions prohibit public employee strikes and many of these substitute interest arbitration or factfinding as a method for resolving negotiation impasses"); *see e.g.*, Cal. Lab. Code § 1962 (firefighters prohibited from striking); *City of Santa Ana v. Santa Ana Police Benevolent Assn.*, 207 Cal.App.3d 1568 (Cal. Ct. of Appeal 1989) (police officers prohibited from striking); *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.*, 38 Cal.3d 564, 586 (Cal. 1985) (recognizing general "prohibition against firefighters and law enforcement personnel" strikes).

Public employee unions, of course, rely on fair share fees to pay for the costs of collective bargaining and grievance processing for nonmembers. And they have negotiated and entered into binding multi-year labor contracts with their employers that contain agency fee requirements. They have developed and made budgetary decisions relying on such contracts and agreements. Overruling *Abood* would effectively strike those mutually-agreed-upon agency fee provisions from labor contracts and greatly weaken those collective bargaining and grievance processing systems upon which countless public employees and employers rely.

Abolishing the agency fee system freely negotiated under the auspices of state law would be detrimental not only for state-law based collective bargaining and the labor contracts that are their product, but also for the public employees who labor under such contracts, for the public employers who rely on the stability and

productivity ensured by such contracts, and for the public they both ultimately serve.

CONCLUSION

For all these reasons, the public safety *Amici* urge this Court to affirm the judgment of the Seventh Circuit and to decline Petitioner's invitation to upend labor relations across the country by overruling *Abood*. More than half the states have collective bargaining laws grounded in *Abood*'s continuing validity. And countless public safety employees serving the states and their local communities have negotiated and entered into labor contracts dependent on *Abood*.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-681

IN THE
Supreme Court of the United States

PAMELA HARRIS *et al.*,

Petitioners,

v.

PAT QUINN, Governor of Illinois, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
for the Seventh Circuit

BRIEF OF 21 PAST PRESIDENTS OF THE D.C. BAR AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 21 former Presidents of the District of Columbia Bar.[2] We submit this brief because Petitioners have asked the Court to "overrule" *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a case that provides support for mandatory bars such as the D.C. Bar. *See Keller v. State Bar of California*, 496 U.S. 1, 12 (1990).

Petitioners say that *Abood* is an "errant exception" to this Court's First Amendment jurisprudence: that it is an "anomaly." Petitioner's Brief at 3, 14. But *Abood* is no such thing. *Abood* has for over thirty years stood at the heart of a well-developed, well-reasoned body of law that has been refined and reaffirmed in numerous opinions of this Court, and whose reasoning has been applied by this Court not only to union shops, but to mandatory

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs are on file with the Clerk.

[2] The signatories to this brief are Jamie S. Gorelick, Shirley Ann Higuchi, George W. Jones, Jr., Kim Michele Keenan, John C. Keeney, Jr., Carolyn B. Lamm, Myles V. Lynk, Andrew H. Marks, Darrell G. Mottley, Stephen J. Pollak, E. Barrett Prettyman, Jr., Daniel A. Rezneck, the Honorable James Robertson (Ret.), Robert J. Spagnoletti, Joan H. Strand, Marna S. Tucker, Mark H. Tuohey, III, Robert L. Weinberg, Robert N. Weiner, Melvin White, and Charles R. Work. *Amici* are acting in their personal capacities and not as representatives of any organizations with which they are affiliated.

bars, agricultural cooperatives, and public universities.

The *Abood/Keller* line of cases represents a stable body of law upon which integrated bars, including the D.C. Bar, have relied for many years in structuring their activities. Overruling *Abood* would have a profoundly destabilizing impact on bars all over the country. We ask this Court to leave *Abood* undisturbed.

SUMMARY OF ARGUMENT

The body of law at issue in this case holds that dissenting members of a collective bargaining unit may properly be required to pay their fair share of the costs of the union's core collective-bargaining-related services, but not of the union's unrelated political or ideological activities. Similarly, this body of law holds that members of mandatory bars may properly be required to pay their fair share of the core functions of mandatory bars, but not of the bar's unrelated political activities or policy initiatives. The Court has reasoned that where an entity such as a union or a mandatory bar has a statutory duty to perform services for the benefit of a defined group of people, members of that group may properly be required to pay for the costs of those services. *Abood*, 431 U.S. at 221-22; *Keller*, 496 U.S. at 12.

The Petitioners have characterized the principal rationale for this body of law — that individuals who benefit from services may properly be required to pay their *fair share* of the costs — as an "anomaly" that should be declared "invalid." Petitioners' Brief at 14, 34. This "fair share" rationale is no anomaly in the union shop or

mandatory bar contexts. As we show immediately below, this "fair share" rationale has been repeated and reaffirmed in opinion after opinion after opinion issued by this Court over a 50-year period in both the union shop and mandatory bar contexts. It was explained, perhaps most forcefully, in a concurring and dissenting opinion in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. . . . In the context of bargaining, a union *must* seek to further the interests of non-members; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others.

Id. at 556 (Scalia, J. concurring in part and dissenting in part).

The request by Petitioners that this Court overrule *Abood* should be firmly rejected. *Abood* is part of a soundly reasoned and stable body of law to which bars throughout the country have conformed their behavior. A decision overruling *Abood* and its fair share rationale would, at a minimum, create uncertainty and instability injurious to the important work that mandatory bars do both for the legal profession and for the administration of justice.

ARGUMENT

I. *ABOOD* IS AT THE HEART OF A WELL-DEVELOPED BODY OF LAW AND SHOULD NOT BE OVERRULED.

A. *Hanson*

The line of precedent at issue in this case begins with *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). *Hanson* arose out of the Railway Labor Act (RLA), a federal statute that overrode State "right to work" laws and permitted the railroads and unions to enter into collective bargaining agreements that provided for "union shops." *See id.* at 231-32. Under such agreements, employees in a collective bargaining unit who do not wish to join the union are nonetheless required to pay their fair share of the costs of the unions' collective bargaining services. *See id.* at 236-38.

In *Hanson*, several employees claimed that the mandatory dues requirement violated their First Amendment rights of free association. *See id.* at 236-38. The Court held that Congress' enactment of the RLA constituted government action that implicated the First Amendment's right to free association, but it rejected the First Amendment claim on the merits. *Id.* at 238.

The Court took note of the concern that motivated Congress in enacting the RLA: "while non-union members got the benefits of the collective bargaining of the unions, they bore 'no share of the cost of obtaining such benefits.'" *Id.* at 231 (quoting H.R. Rep. No. 81-2811, at 4 (1950)).

The Court then *held* that:

> [T]he requirement for financial support of the collective bargaining agency *by all who receive the benefits of the work* . . . does not violate either the First or Fifth Amendments.

Id. at 238 (emphasis added).[3]

The Court also stated, however, that requiring non-union members to provide financial support to the unions' political activities, not "germane" to collective bargaining, would raise a very different problem not presented on the record in *Hanson*. *Id.* at 235-36.

B. *Street*

Four years later, the Court answered the question not reached in *Hanson*, concluding that non-union employees could not lawfully be required to fund political activities unrelated to collective bargaining. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961).

The Court began its opinion by reaffirming *Hanson*. *Id.* at 746-49. As Justice Douglas explained

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[3] The Court also stated, presaging the parallel development of the Court's First Amendment decisions on the subject of mandatory bar dues:

> On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.

Id. at 238.

further in his concurring opinion, "all the members of the laboring force" are beneficiaries of the union's collective bargaining services, and it is "permissible for the legislature to require *all who gain from collective bargaining to contribute to its cost.*" *Id.* at 776 (Douglas, J., concurring) (emphasis added).

The concurring opinion elaborated:

> The collection of dues for paying the costs of collective bargaining of which each member is a beneficiary is one thing. If, however, dues are used . . . to promote [a variety of unrelated political or ideological causes] then the group compels an individual to support with his money causes beyond what gave rise to the need for group action.

Id. at 777.[4]

C. *Abood*

The court first addressed union shops in the context of public employment in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Declining to distinguish between the public employees in *Abood* and the private employees in *Hanson* and

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[4] In *Street*, the Court *construed* the Railway Labor Act to prohibit collection of dues from objecting non-members to pay for political or ideological causes unrelated to collective bargaining activities, and it therefore did not reach the question whether the United States *Constitution* would have forbidden the union from doing so. However, the desire to avoid First Amendment issues strongly influenced the Court's construction of the RLA. *Id.* at 749-50.

Street, *id.* at 226, 229, the Court stated that "[t]he plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no *First Amendment* violation." *Id.* at 226 (emphasis added). Accordingly, it held that all public employees in the bargaining unit could constitutionally be required to pay their fair share of the union's services related to "collective bargaining, contract administration and grievance adjustment," but objecting non-members could *not* constitutionally be required to contribute funds for the unions' unrelated political activities. *Id.* at 225-26, 232, 234.

The *Abood* Court began by reaffirming *Hanson* and *Street* and elaborating on the Court's fair share rationale. The Court explained that having a single exclusive union representative for a given category of employees was a central principle of congressional labor policy. Multiple unions — each one negotiating a different contract, with different terms, for different employees — would create massive confusion and undermine the advantages of collective bargaining. This congressional policy thus *necessarily brings a group of employees together* for the purpose of negotiating a single collective bargaining agreement covering all employees in the group. *See id.* at 220-21.

The Court then explained that a union elected to be the single exclusive representative of a group of employees had "great" and "continuing" responsibilities under the law that included the legal duty "'fairly and equitably to represent *all* employees . . . *union and non-union*' within the relevant unit." *Id.* at 221 (citation omitted) (emphasis added). As a result, the Court explained:

> [A] unionshop arrangement has been thought to *distribute fairly the cost* of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" — to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Id. at 221-22 (emphasis added).

The Court concluded its review and reaffirmation of *Hanson* and *Street* by saying:

> As long as [the union] act[s] to promote the cause which justified *bringing the group together*, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.

Id. at 223 (quoting *Street*, 367 U.S. at 778 (Douglas, J., concurring)) (emphasis added).

Turning to the use of compulsory dues to fund the union's political activities unrelated to collective bargaining, the Court held that a union may not

> spend[] a part of [objecting employees'] required service fees to contribute to political candidates and to express political views *unrelated to its duties as exclusive bargaining representative.*

Id. at 234 (emphasis added).

D. *Ellis*

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), the Court refined the lines drawn in *Abood* and *Street* between costs that are properly included in the fee objecting employees had to pay and those that are not.

The Court began its analysis, once again, by reviewing and reaffirming the "fair share" rationale underlying *Hanson*, *Street* and *Abood*. Specifically, the Court stated:

> We remain convinced that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders — employees in the bargaining unit *on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof.*

Id. at 447 (emphasis added).

The Court then articulated the First Amendment "test" to be applied in drawing the line between union expenditures chargeable to objecting employees, and those that are not chargeable:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their *fair share* of not

> only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448 (emphasis added). Applying this test, the Court held three of the categories of activities to be properly chargeable to dissenting employees: national conventions, social activities, and certain publications. Three others — litigation unconnected to collective bargaining, general organizing efforts, and certain other publications — were held not chargeable. *Id.* at 448-57.

E. *Hudson*

In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court addressed the internal *procedures* that must be developed by unions to prevent the improper charging to objecting employees of non-chargeable expenditures.

Before addressing the procedures of the defendant union, the Court reaffirmed the fair share principles of its prior cases, stating that, in *Abood*,

> We . . . rejected the claim that it was unconstitutional . . . to require nonunion employees, as a condition of employment, to pay *a fair share of the union's cost* of negotiating and

> administering a collective-bargaining agreement.

Id. at 301-02 (emphasis added).

The Court then turned to the procedures in place at the defendant union, finding them inadequate in three respects, and ordered the inadequacies to be corrected. *Id.* at 304-11.

F. *Lehnert*

The Court reaffirmed the core holding of the *Abood* line of cases in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). While the Court split regarding the precise test for identifying chargeable expenses, all nine justices agreed that the *Abood* doctrine is sound.

Once again, the Court began by reaffirming *Hanson*, *Street*, *Ellis*, and *Abood*. As to the RLA cases, the court stated that "those cases make clear that expenses that are relevant or 'germane' to the collective bargaining functions of the union generally will be constitutionally chargeable to dissenting employees." *Id.* at 516.

As to *Abood*, the Court said that compulsory financial support of the collective-bargaining-related services of a public-employment union does not, without more, violate the First Amendment:

> [A]n employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative.

Id. at 517.

The Court then held that, in order to be chargeable to dissenting public employees, the expenditures must be 1) germane to collective bargaining activity; 2) justified by the government's interest in labor peace and avoiding "free riders"; and 3) not significantly adding to the burdening of free speech inherent in a union shop. *Id.* at 519.[5]

Although the portion of the Court's opinion described above received only five votes, the concurring and dissenting opinion of Justice Scalia (joined in by Justices O'Connor, Souter and, as to the portion quoted below, Justice Kennedy) gave emphatic support to the proposition that objecting members of a bargaining group may be required to pay their fair share of the cost of the union's core collective bargaining services. Thus, the concurring opinion, hewing closely to the language and holdings in *Abood* and *Ellis*, stated:

> Our First Amendment jurisprudence . . . recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other. Where the state imposes upon

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[5] The challenged expenditures included lobbying and publicity not involving ratification of the collective bargaining agreement, attending conventions, a union newsletter, collective bargaining training and other services of the national union, and preparations for a strike, that if carried out, would have been illegal. Applying this standard, the Court upheld some of the challenged expenditures and ruled that others violated the First Amendment.

the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry — indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.

> Once it is understood that the source of the state's power, despite the First Amendment, to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership, the constitutional limits on that power naturally follow. It does not go beyond the expenses incurred in discharge of the union's "great responsibilities" in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances," *Abood*, 431 U.S., at 221; the cost of performing the union's "statutory functions," *Ellis*, 466 U.S., at 447; the expenses "necessary to 'performing the duties of an exclusive representative.'" [*Communications Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988).]

Id. at 556-57 (Scalia, J., concurring in the judgment in part and dissenting in part).

Consequently, all nine Justices in *Lehnert* endorsed the Court's fair share rationale in upholding union shop provisions for public employees.

G. *Locke*

In *Locke v. Karass*, 555 U.S. 207 (2009), the Court addressed whether a local union's *pro rata* share of litigation expenses incurred by the national

union was properly chargeable to the local's dissenting non-members. The expenses were incurred in connection with collective-bargaining-related litigation involving a different local. The Court held the expenses were properly chargeable because — as the parties had conceded — other locals had a reciprocal obligation to contribute their *pro rata* share of similar litigation expenses involving the objecting non-members' local. *Id.* at 219-21.

The opinion of the Court, joined in by all of its nine members, reaffirmed *Hanson*, *Street*, *Abood*, *Ellis*, and *Lehnert* and specifically endorsed the Court's prevention-of-free-riding rationale. *Id.* at 213.[6]

* * * * *

The above decisions constitute an unbroken line of holdings by this Court that non-union employees may — consistent with First Amendment principles — be required to pay service fees to the union for costs of collective-bargaining-related services. And each decision rests on the common-sense proposition that those who benefit from

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[6] There is language in the Court's opinion in *Knox v. Service Employees International Union, Local 100*, 132 S. Ct. 2277 (2012), to the effect that prevention of free riding is not generally sufficient to overcome First Amendment objections, citing examples *unrelated* to union shops or mandatory bars. *Id.* at 2290. *Knox* itself involved union expenditures *unrelated* to collective bargaining that were treated procedurally by the union in a way that failed to comply with *Hudson*, *supra*. *Knox* did not overturn any of the union shop First Amendment law discussed above.

services required by law to be performed for them may properly be required to pay their *fair share* of the costs.

II. A CLOSELY RELATED BODY OF CASE LAW SUPPORTS THE CONSTITUTIONALITY OF MANDATORY BAR DUES.

This Court's decisions supporting the constitutionality of compulsory "fair share" fees for a union's collective-bargaining-related services have developed hand-in-hand with its decisions upholding the constitutionality of the common state-law requirement that all attorneys licensed to practice law in a state must pay dues representing their "fair share" of the cost of an integrated bar's services.

Some thirty-two States and the District of Columbia have created what are known as "integrated bars." An integrated bar is "an association of attorneys in which membership and dues are required as a condition of practicing law in a State." *Keller*, 496 U.S. at 5. In general, integrated bars are charged by the courts or the legislatures with responsibilities for regulating lawyers licensed to practice in particular States and improving the administration of justice.

This Court has twice been presented with challenges — on First Amendment freedom of association grounds — to a bar's mandatory dues requirement. Each case was brought by bar members who objected to the use of their dues for what they claimed to be political or ideological activities with which they disagreed. Each time, this Court drew on its union shop decisions and applied a

rule for bars analogous to the one adopted for union shops. And each time, the Court relied heavily on its "fair share" rationale repeated so often in the union shop cases.

Thus, these decisions establish that objecting bar members may constitutionally be required to pay dues representing their fair share of the cost of a bar's services in regulating the profession and improving the administration of justice, but not to fund unrelated political activities.

A. *Lathrop*

This Court addressed the subject of mandatory bar dues directly in *Lathrop v. Donahue*, 367 U.S. 820 (1961).[7] The Supreme Court of Wisconsin, exercising authority provided by the Wisconsin legislature, had created an integrated bar: *i.e.*, it had required everyone licensed to practice law in Wisconsin to join the State Bar and to pay prescribed annual dues to it. The integrated State Bar was created to "elevat[e] the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State." *Id.* at 843.

A member of the State Bar objected to the mandatory dues requirement, on freedom of association grounds, claiming that the Bar engaged in political activities which he opposed. Because there was no factual basis for the claim that the Bar

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[7] As noted above, the Court had assumed in *Hanson* that mandatory bar dues, generally, were consistent with the requirements of the First Amendment. *See supra* n.3.

had used the challenger's funds for political activities, this Court treated the case as a facial challenge to the requirement that all licensed lawyers pay mandatory dues. *Id.* at 847-48.

The opinion for a four-member plurality rejected the Constitutional claim, stating:

> In our view, the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225.

Id. at 842.

The plurality explained that "the bulk of State Bar's activities serve the function . . . of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State," and concluded that the Supreme Court of Wisconsin

> may constitutionally require that the *costs of improving the profession* in this fashion *should be shared by the subjects and beneficiaries* of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

Id. at 843 (emphasis added).

In an opinion authored by Justice Harlan and joined in by Justice Frankfurter, these two additional justices concurred, stating:

> The *Hanson* case . . . surely lays at rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified by state needs as the union shop is by federal needs.

Id. at 849 (Harlan, J., concurring in the judgment).

B. *Keller*

The Court addressed mandatory bar dues again in *Keller v. State Bar of California*, 496 U.S. 1 (1990). In *Keller*, members of the California integrated bar challenged the State Bar's use of their dues on freedom of association grounds, claiming that the bar had used those dues to finance certain ideological or political activities to which they were opposed. A unanimous Court, drawing heavily on its opinion in *Abood*, held that the members' dues could be used over their objection in furtherance of the bar's core purposes, but that they could not be used for unrelated political or ideological activities.

The Court found that the Bar had been given the responsibility by the State to examine applicants for admission to the bar; to formulate rules of professional conduct; to discipline bar members for misconduct; to prevent the unlawful practice of the law; and to engage in the study of and recommend changes in procedural law and improvement of the administration of justice. *Id.* at 5. The Court pointed out that the California Legislature wanted recommendations concerning "admissions," "discipline," "codes of conduct and the like," "*to be*

made to the courts or legislature by the organized bar." *Id.* at 12 (emphasis added). The Court pointed out further that this regime benefitted lawyers generally, because they "prefer a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession." *Id.*

Turning to the constitutional issue, the Court reiterated a theme it had sounded since *Hanson*:

> There is . . . a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other.

Id.

The Court then turned to its union shop jurisprudence and the "fair share" rationale that underlies it:

> The reason behind the legislative enactment of "agency-shop" laws is to prevent "free-riders" — those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues — from avoiding their *fair share of the cost* of a process from which they benefit.

Id. (emphasis added). Then, after noting that members of state *bars* generally benefit from participating in their own regulation, the Court stated:

> It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a *fair share of the cost* of the professional involvement in this effort.

Id. (emphasis added).

The Court then turned to the claim that the State Bar had expended dues-paid funds on a variety of political activities unrelated to the Bar's core functions, and said:

> *Abood* held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 13-14.

The Court further emphasized, however, that:

> [P]etitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

Id. at 16.

Thus, while there are differences between bars and unions and the relevant state interests may vary, they are part and parcel of the same body of First Amendment law, and each is governed by the same sound fair-share principles, the overruling of which would create uncertainty for and cause harm to both.

III. OTHER APPLICATIONS OF THE *ABOOD* AND *KELLER* BODY OF CASE LAW

This Court has also repeatedly looked to *Abood* and *Keller* to guide its First Amendment analysis in compulsory-funding cases outside the union and bar-association context.[8] The Court has

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[8] Many federal and state courts have come to view *Abood* and *Keller* as representing closely related lines of authority. *See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000) ("The *Abood* and *Keller* cases, then, provide the beginning point for our analysis."); *Acevedo-Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir. 2002) (referring to "the *Abood/Keller* line of cases"); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 917 (9th Cir. 2005) (discussing "the rationale of the *Abood* and *Keller* line of cases"); *Gerawan Farming, Inc. v. Kawamura*, 90 P.3d 1179, 1185 (Cal. 2004) ("*Abood* and *Keller* are the cornerstones of United States Supreme Court jurisprudence regarding government-compelled funding of private speech."); *BellSouth Adver. & Publ'g Corp. v.* (continued...)

relied, in part, on *Abood* and *Keller* to hold that a public university may "require[] its students to pay fees to support the extracurricular speech of other students," *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000), even though "[i]t is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs," *id.* at 232; *see also id.* at 230-34. And the Court has applied *Abood* and *Keller* to delineate the circumstances in which the First Amendment permits the government to require participants in an industry to contribute financially to advertising that supports the industry as a whole. *See United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). A decision overruling *Abood* would thus disturb the settled doctrine on which a wide variety of social and economic arrangements depend.

IV. PRINCIPLES OF *STARE DECISIS* COUNSEL AGAINST OVERRULING *ABOOD*.

One of the advantages of stability in the law is that it provides people and institutions with the opportunity to conform their behavior to the law's requirements. Bars across the country have taken steps over the past two-plus decades to bring their practices into compliance with the substantive and

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Tenn. Regulatory Auth., 79 S.W.3d 506, 518 (Tenn. 2002) (discussing "the *Abood-Keller* standards").

procedural requirements of *Keller*.[9] The overruling of *Abood* would inevitably inject significant uncertainty and instability into a body of law that has been stable for over fifty years.

This risk is by no means only a theoretical one. Earlier this month, the Nebraska Supreme Court made substantial changes to the rules governing its Bar. It did so because language in *Knox*, *supra*, created "doubt" about the constitutionality of opt-out systems for dissenting members.[10] *Knox* was a case involving only *unions*, yet it had immediate repercussions for bars, prompting the Nebraska Supreme Court to rewrite its rules, greatly restricting the activities of the bar that may be funded by mandatory dues.[11] The Nebraska court narrowed the approved scope of its Bar's activities not because it found that the First Amendment required it, but out of an abundance of caution because of uncertainty and in order to avoid the risk of disputes over the Bar's activities.[12] The overruling of *Abood* could be expected to inject into

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[9] *See, e.g.*, *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 709 (7th Cir. 2010); *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1043 (9th Cir. 2002); *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1175 (9th Cir. 1999); *Petition of the R.I. Bar Ass'n*, 650 A.2d 1235, 1237 (R.I. 1994) (per curiam).

[10] *Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, No. S-36-120001, 286 Neb. R. 1018, 1031-32, 1034-37, -- N.W.2d --, Neb. Advance Sheets (Dec. 6, 2013) (per curiam).

[11] *Id.* at 1035.

[12] *Id.* at 1035-37.

the law governing bars much more uncertainty than *Knox* already has.

This is precisely the kind of uncertainty that *stare decisis* principles are meant to prevent. Petitioners nonetheless ask the Court to "overrule *Abood*," with no mention of principles of *stare decisis* and no effort to explain why circumstances here would justify a departure from those principles. The request is made in spite of the fact that Petitioners did not challenge the continued validity of *Abood* in the courts below; the Court of Appeals has had no opportunity to consider or address such a challenge; and the continued validity of *Abood* is not an issue raised or suggested by either of the questions presented. Petitioners point to no changes in factual circumstances that have rendered existing law unworkable. *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992). They point to no change in the law that might leave the *Abood/Keller* body of law "no more than a remnant of abandoned doctrine." *Id.* And they say nothing about the disruptive effect that the overruling of *Abood* would have on institutions that have conformed their practices to comply with longstanding doctrine.

Amici submit that the body of law represented by *Abood* and *Keller* is sound and well-reasoned, and that its overruling would have disruptive effects on bars across the country. We urge the Court to reject Petitioners' invitation to overrule it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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